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REPORT OF CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT
OF THE
TERRITORY OF ARIZONA

FROM 1893 TO 1895, INCLUSIVE

E. W. LEWIS
REPORTER

VOLUME FOUR

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY

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Rec. Dec. 30, 1904.

SUPREME COURT.

1893.

HENRY C. GOODING, Chief Justice,¹
ALBERT C. BAKER, Chief Justice,²
RICHARD E. SLOAN, Associate Justice,
JOSEPH H. KIBBEY, Associate Justice,¹
EDMUND W. WELLS, Associate Justice,¹
O. T. ROUSE, Associate Justice,³
J. J. HAWKINS, Associate Justice.⁴

OFFICERS OF THE COURT.

T. F. WILSON.....U. S. District Attorney
ROBERT H. PAUL.....U. S. Marshal
W. K. MEADE.....U. S. Marshal⁵
WILLIAM HERRING.....Attorney-General¹
FRANCIS J. HENEY.....Attorney-General⁶
T. D. HAMMOND.....Clerk

¹ Resigned.

² Appointed May 24, 1893.

³ Appointed April 15, 1893.

⁴ Appointed April 10, 1893.

⁵ Appointed October, 1893.

⁶ Appointed April 13, 1893.

SUPREME COURT—Continued.

1894-1895.

ALBERT C. BAKER, Chief Justice,
RICHARD E. SLOAN, Associate Justice,¹
O. T. ROUSE, Associate Justice,
J. J. HAWKINS, Associate Justice,
J. D. BETHUNE, Associate Justice.²

OFFICERS OF THE COURT.

T. F. WILSON.....U. S. District Attorney
E. E. ELLINWOOD.....U. S. District Attorney³
W. K. MEADE.....U. S. Marshal
FRANCIS J. HENEY.....Attorney-General
THOMAS D. SATTERWHITE.....Attorney-General⁴
T. D. HAMMONDClerk⁵
J. L. B. ALEXANDER.....Clerk⁶

¹ Term expired June, 1894.

² Appointed June, 1894.

³ Appointed January, 1894.

⁴ Appointed January, 1895.

⁵ Resigned January, 1894.

⁶ Appointed January, 1894.

RULES OF COURT.

SUPREME COURT OF THE TERRITORY OF ARIZONA.

ORAL ARGUMENTS.

In oral arguments on appeal or writ of error in this court, the time occupied shall be limited to one hour on each side, unless, on written motion previously filed with the clerk and presented to the court, sufficient cause be shown for an extension of time. The order of the argument shall be, unless otherwise ordered, three quarters of an hour to appellant or plaintiff in error in which to open; one hour to appellee for answer, and one quarter of an hour to appellant for reply.

Approved January 16, 1893.

ASSIGNMENT OF ERRORS.

RULE I.

The assignment of errors must be distinctly specified. Each ground of error relied upon to be distinct must state the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for a new trial, with other rulings, or in any other motion, given in a bill of exceptions, in a statement of facts, or otherwise in the record, it must, nevertheless, be set forth in the assignment of errors specifically or it will be deemed waived.

The assignment of error that the court erred in overruling motion for a new trial, where the motion is based upon more than one ground, will not be considered as distinct and specific, but in addition to such assignment each ground set out in the motion relied upon as error in this court must be separately and distinctly stated.

The purpose of the assignment of errors in the first instance is to apprise the appellee of the particular specific rulings of the trial court of which the appellant complains, and, secondly, to call the attention of this court thereto.

Any objection to any ruling or action of the court below will be deemed waived, unless it shall have been assigned as error in the manner above provided.

No amendment of an assignment of errors will be allowed except upon a showing by affidavit of excusable neglect.

No assignment of errors will be allowed in this court when none was filed in the district court, nor an additional assignment of errors except by consent of parties hereto.

RULE II.

In assigning error in the giving of instructions to the jury by the lower court, the appellant must state whether the instruction complained of is erroneous in its statement of the law applicable to any set of facts, or that it is an erroneous application of the law to the particular facts of the case appealed, stating briefly the facts to which it was applied.

If the instruction contains more than one proposition of law, or contains a limitation of a general proposition, the assignment shall distinctly specify what proposition or limitation is complained of.

If the refusal to give an instruction asked for of the appellant in the court below be assigned as error, the assignment must state the applicability of such instruction to the facts of the case.

RULE III.

This court will deem as waived all errors not argued in his brief by the party assigning them.

Approved January 18, 1893.

OPINIONS.

Upon the final decision of a case in this court, there shall be filed by the clerk with the papers herein, a copy of the opinion of the court whereon the decision is based, and the clerk of the court may tax against and collect of the losing party, unless otherwise ordered, as a fee for such copy, the sum of ten cents for each one hundred words thereof.

Approved January 28, 1893.

TRANSCRIPTS.

RULE I.

I. All transcripts of record in civil cases brought to this court on appeal or writ of error shall be printed on white paper, eight inches by ten inches in size, in a neat and workmanlike manner, with pica type, or in typewriting, leaving a sufficient margin to permit its being bound together in book form; that is to say, fastened together only on the left-hand side, and shall be so fastened. Each tenth line thereof shall be plainly and consecutively numbered as a folio on the left margin of the page.¹

II. The transcript shall be chronologically arranged; shall be prefaced with an alphabetical index of its contents, specifying the folio of each separate paper, order, and the testimony of each witness; and shall have a cover.

III. Bills of exception and statements of facts may be consolidated into one and the same paper; but in all cases the same shall be in narrative form, tersely and succinctly stated. Copies of all papers, vouchers, exhibits, motions, pleadings, and orders shall omit the venue of the court, the title of the cause, and the signature thereto; the object thereof being to discard unnecessary matter. For example, in incorporating a motion for a new trial or other paper, the form that is herein recommended to be followed is as follows: "And thereupon, on ———, 189— defendant filed his motion for a new trial, as follows"; and then insert the reasons assigned in the motion. All motions and demurrers that are inserted in transcripts of the record shall only contain the reasons assigned in such motion or demurrer. The body of all pleadings shall be copied in the transcript of the record *totidem verbis*, but the venue of the court, the title of the cause, and the signature thereto shall be omitted. Whenever any objection is made to evidence or to any question propounded to a witness, in every such case the question and answer of the witness shall be inserted *totidem verbis*.

IV. If the transcript be printed, there shall be six copies thereof filed with the clerk. If it be in typewriting, there shall be four copies filed with the clerk.

V. Whenever a map or survey forms part of the transcript

¹ See amendment to rule I, subd. I, *post*, p. XIII.

it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the clerk, and reference thereto shall be made in the other copies.

MOTIONS.

RULE II.

I. All motions relating to informalities in the manner of bringing a case to this court shall be filed with the clerk on or before the second day of the term in which the transcript is filed, a copy thereof being served on opposing counsel on or before the same day; otherwise, the ground of the objection shall be considered as waived, if it can be waived.

II. Motions to dismiss for want of jurisdiction of this court, and for such defects as defeat the jurisdiction in the particular case, that cannot be waived, are recommended to be filed on or before the second day of the term, a copy thereof to be served on the opposite party; but such motion may be made at any time, and shall be entertained by the court, after such notice to opposing counsel as the court may deem proper to be given under the circumstances.

III. Motion made to sustain or defeat the jurisdiction of the court, dependent on facts not apparent in the record, and of which the court cannot take judicial notice, must be supported by affidavit or other satisfactory evidence, copies of which must be served on the opposing counsel.

IV. Motions will be called for hearing on the third day of the term, and be disposed of in their order.

V. No oral arguments will be heard on motion, except in such cases as the court may direct.

VI. The clerk, upon filing a motion, shall docket the same in his docket, to be known as the "Motion Docket," together with the name of the attorney who makes the motion, and the kind of motion made. Any opposition in the way of answer to said motion shall be filed, and shall in like manner be numbered and noted in the motion docket, together with the names of the respective attorneys making and opposing any such motion.

VII. There shall be no oral argument on motions for rehearing unless such argument is requested by the court.

VIII. No motion for rehearing shall be amended, except by leave of the court.

BRIEFS AND ARGUMENTS.

RULE III.

I. For the appellant or plaintiff in error, and for the appellee or defendant in error, there shall be filed six copies of a brief, or a brief and argument, with the clerk of the court. All briefs in civil cases shall be printed in pica type, on white paper, in size eight inches wide and ten inches long, with an unprinted margin of not less than one and one half inches in width.¹

II. The brief shall contain, in the order here stated: —

1. A concise statement, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

2. A specification of the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to be the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be to the instruction given, or to the instruction refused. When the error alleged is to the finding of a court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding.

3. A brief of the argument, exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the folios of the transcript of the record that are pertinent thereto, and the authorities relied upon in support thereof.

III. The brief of the appellee or defendant in error shall be of a like character with that required of the appellant or plaintiff in error, except that no specification of error shall be required and no statement of the case, unless that presented by the appellant or plaintiff in error is controverted.

IV. Whenever an appellant or plaintiff in error is in default, the appeal or writ of error may, on motion, be dismissed; and, whenever an appellee or defendant in error shall be in default, he will not be heard except on consent of his adversary or by request of the court.

¹ See amendment to rule III, subd. I, *post*, p. XIII.

V. Within thirty days next after the appeal or writ of error is perfected, and the statement of facts and bill of exceptions have been made a part of the record in the case, the appellant shall serve upon the attorney of the opposite party a copy of his brief, prepared in conformity with rule II of this article; and, within thirty days next thereafter, counsel for appellee or defendant in error shall serve upon the counsel for appellant or plaintiff in error a copy of his answer thereto; and, within fifteen days next thereafter, the counsel for the appellant or plaintiff in error shall serve upon the counsel for appellee or defendant in error his reply thereto, if one be filed.

VI. Six copies of these briefs, so made and served, shall be filed with the clerk of this court, on or before the first day of the term to which such appeal or writ of error is returnable.

VII. If the time given by rule V of this article in which to make, serve, and file such briefs will not expire before the first day of the term of this court to which the appeal or writ of error is returnable, then, in every such case, either party to such appeal or writ of error may serve the other with written notice that such appeal or writ of error will be urged to a submission at the term to which it is returnable, in which event counsel for appellant or plaintiff in error shall make and serve his brief, as hereinbefore required, within fifteen days next after the service of such written notice; and counsel for appellee or defendant in error shall have a like time thereafter in which to make and serve his answer thereto; and counsel for appellant or plaintiff in error shall have five days next thereafter in which to make and serve his reply. And, in all such cases, six copies of such brief, answer, and reply shall be filed with the clerk of this court, on the day succeeding that on which said reply is due to be served, unless such day shall fall on a holiday, and in that event the same shall be filed on the day following.

VIII. In case any brief, answer, or reply shall not be served as provided in this article, or shall not be served in the time specified, then the court may on motion strike such brief, answer, or reply from the files of the court, and consider and decide the case as though such defaulting party had made no appearance in the case, or may, in proper cases, dismiss the

appeal or writ of error for want of due prosecution of the same.

IX. In all cases where the briefs hereinbefore provided for shall have been filed, either party will be heard orally for such time as may be fixed by the court, not to exceed one hour.

SERVICE.

RULE IV.

Attorneys and guardians *ad litem* in the court below will be deemed attorneys and guardians *ad litem* of the same parties in this court until a substitution of record is made; and service of all papers, notices, briefs, etc., may be made on such attorneys or guardians *ad litem* that were such in the court below until such substitution is made, and notice thereof given to opposing counsel.

DIMINUTION OF RECORD.

RULE V.

For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and, upon good cause being shown, obtain an order that the proper clerk certify to this court the whole or any part of the record as may be required, or may produce the same duly certified without such order. If the attorney of the adverse party be absent, or the fact of the alleged defect be disputed, the suggestion, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit, showing the existence of the defect alleged.

ASSIGNMENT OF ERRORS.

RULE VI.

I. All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for a new trial with other rulings, or in any motion, or in a bill of exceptions, or in a statement of facts, or otherwise in the record, it must, nevertheless, be referred to in the assignment of errors, or it will be deemed to be waived.

II. If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors.

III. An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided.

IV. If the assignment of error be to the giving of instructions to the jury by the lower court, the appellant must state whether the instruction complained of is erroneous in its statement of the law applicable to the case, or to any particular fact or facts thereof.

V. If the refusal to give an instruction asked for by the appellant in the court below be assigned as error, the assignment must state the applicability of such instruction to the fact or facts of the case.

VI. Assignment of errors shall not be amended in this court.

COSTS.

RULE VII.

Costs shall be allowed to the successful party by this court, as follows:—

For transcript of the record, the amount paid therefor to the clerk of the district court from which the transcript comes, and the expense of printing or typewriting the copies thereof; the costs of the clerk of this court; and the sum of one dollar per page of the brief of the successful party, not exceeding twenty dollars in any one case.

APPEARANCE FEE.

RULE VIII.

In all civil cases the appellant or plaintiff in error shall deposit with the clerk of this court ten dollars, and the appellee or defendant in error five dollars. The clerk of the court will not be compelled to docket any case, nor to file any paper, until such appearance fee is paid. As soon as the amount so deposited shall not equal the costs in this court of the party so depositing the same, then, and in every such case, the clerk of this court may call upon such party to make an additional

deposit of a like amount, and, until such additional amount be deposited, the clerk will not be compelled to file any paper, or do any other thing in said case for the party that is so in default.¹

FILES.

RULE IX.

No paper shall be taken from the office of the clerk of this court except by order of the court.

Approved:

A. C. BAKER, C. J.
RICHARD E. SLOAN, A. J.
JOHN J. HAWKINS, A. J.
OWEN T. ROUSE, A. J.

Monday, January 29, 1894.

AMENDMENTS TO RULES.

Amend rule I, subdivision I, so as to read:

“All transcripts of record in civil cases brought to this court on appeal or writ of error shall be printed on white paper, eight inches by ten inches in size, in a neat and workmanlike manner, with pica type, or in typewriting, not exceeding a second impression, and leaving a sufficient margin to permit its being bound together in book form; that is to say, fastened together only on the left-hand side, and shall be so fastened.

“Each tenth line thereof shall be plainly and consecutively numbered as a folio, on the left margin of the page.”

Amend rule III, subdivision I, so as to read as follows:

“For the appellant or plaintiff in error, and for the appellee or defendant in error, there shall be filed six copies of a brief, or a brief and argument, with the clerk of the court, which shall be either printed or typewritten, and all briefs in civil cases, when printed, shall be in pica type, on white paper, not to exceed in length nine and one eighth inches, and in width six inches, with unprinted margin of one and two eighths inches. Typewritten briefs shall be of the same size, and shall not exceed second impression copies. All briefs

¹ See amendment to rule VIII, *post*, p. XIV.

shall be in pamphlet form, and with covering upon the back only.”

Amend rule VIII so as to read:

“In all civil cases the appellant or plaintiff in error shall deposit with the clerk of this court twenty dollars, and the appellee or defendant in error ten dollars.

“The clerk will not be compelled to docket any case, nor to file any paper, until such appearance fee is paid. As soon as the amount so deposited shall not equal the costs in this court of the party so depositing the same, then, and in every such case, the clerk of this court may call upon such party to make an additional deposit of a like amount; and, until such additional amount be deposited, the clerk will not be compelled to file any paper, or do any other thing in said case for the party that is so in default.”

March 8, 1894.

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OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1893.

[Civil No. 306. Filed January, 1893.]

[32 Pac. 165.]

W. W. PORTER, Petitioner, v. THOMAS HUGHES, Terri-
torial Auditor, Respondent.

- 1. OFFICERS — GOVERNOR — VETO — SIGNATURE EVIDENCE OF APPROVAL**
—ACT OF CONGRESS OF JULY 19, 1876—ORGANIC ACT CONSTRUED—
REV. STATS. ARIZ. 1887, APPENDIX, SEC. 1, SUBD. 17, HELD VALID.—
By the terms of the Organic Act, *supra*, the governor, in exercising the veto power, is limited to the following courses of action: First, if he approve a bill, he shall sign it; second, if he shall not approve it, he shall return it, together with his objection, to the house in which it originated; third, he may retain a bill presented to him for his approval until it becomes a law by the expiration of ten days, if the legislature remain in session so long. Whatever the governor may do in the premises has reference to a bill in its entirety. The signature of the governor affixed to a bill is the evidence of his approval, and what he may thereafter do in the way of adding objections to any part of the bill is immaterial; and when it appears that the governor signed the appropriation bill passed in 1887, but in signing it he added that the same was approved, except as to subdivision 17 of section 1, this action must be taken as an approval of the whole bill, including subdivision 17.

MANDAMUS. Original application. Granted.

The facts are stated in the opinion.

W. W. Porter, *in persona*.

William Herring, Attorney-General, for Respondent.

SLOAN, J.—The plaintiff, W. W. Porter, applies to this court for a peremptory writ of *mandamus* to be directed to the defendant Thomas Hughes, auditor of the territory, requiring him, as said auditor, to issue a warrant on the treasurer of the territory, in favor of the plaintiff, for the sum of twelve hundred dollars. This sum plaintiff claims to be due him for salary as one of the district judges of the territory for the years 1887 and 1888, under an act of the legislative assembly entitled “An act making appropriations for the current and contingent expenses of the civil government of the territory of Arizona for the two years ending on the thirty-first day of December, 1888, and for other purposes.” This act is published in the appendix to the Revised Statutes of 1887. Among other items of appropriation enumerated in said act, is one numbered 17 therein, which reads as follows: “For territorial salaries of the district judges, as provided by law, to be expended under the direction of the territorial auditor, to be paid in quarterly installments, \$7,200.00; one half to be expended in each of the years 1887 and 1888.” Following the act as published in the appendix to the Revised Statutes, appears the following note: “Approved March 10, 1887, (except as to item No. 17, which was vetoed by the governor, and veto sustained by the body in which the act originated).” The case was heard upon an agreed statement of facts signed by the plaintiff and by Clark Churchill, attorney-general, for the defendant. The facts as agreed to are as follows: First, that the petitioner was one of the associate judges of the supreme court for the years 1887 and 1888, and district judge; second, that the petitioner received from the territory during that time fifty dollars per month, and no more; third, that the governor signed the appropriation bill passed in the year 1887, as it appears in the appendix to the Revised Statutes; fourth, that in signing it he added that the same was approved, except as to subdivision 17 of section 1, which applies to appropriation for salaries of judges of the district court; fifth, that the auditor has refused a warrant for the amount claimed in the petition, or any other amount.

Under the pleadings and the facts as agreed to, there is but one question in this action for our decision. Did item 17 of said appropriation bill become a law at the time the governor

affixed his signature to the bill, notwithstanding his attempt to except such item from his approval of the bill as a whole? What is commonly known as the "veto power" was conferred upon the governor of the territory by the act of Congress of July 19, 1876. By the terms of this act the governor, in exercising the power, is limited to one of the following courses of action: First, if he approve a bill, he shall sign it; second, if he shall not approve it, he shall return it, together with his objection, to the house in which it originated; third, he may retain a bill presented to him for his approval until it becomes a law by the expiration of ten days after said presentation, provided the assembly shall not have adjourned *sine die* during the ten days, in which case it shall not become a law. By the Organic Act referred to, whatever the governor may do in the premises has reference to a bill in its entirety, and not to any of its parts. A bill is approved as a whole, or disapproved as a whole. The signature of the governor affixed to a bill is the evidence of his approval. In the case of the act in question, it being admitted that the governor affixed his signature to the same, this action of the governor, being in full compliance with the Organic Act, must be taken, therefore, as an approval of the whole bill as passed by the assembly, and as presented to him for his official action. It becomes immaterial what the governor may have done thereafter in the way of adding his objections to any part of said bill, for he had already exercised the full measure of his power in respect thereto. We hold, therefore, said item numbered 17 in said appropriation bill, making appropriations for the salaries of the judges of the district courts, to be valid, and that the plaintiff is entitled to the relief prayed for in his complaint. The writ will issue.

Kibbey, J., and Wells, J., concur.

[Criminal No. 71. Filed January, 1893.]

[32 Pac. 166, *sub nom.* Chartz v. Territory.]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
JOHN CHARTZ, Defendant and Appellant.

1. CRIMINAL LAW—GRAND JURY—HOW SUMMONED—REV. STATS. ARIZ. 1887, PARS. 2184, 2196, CITED AND CONSTRUED.—The Revised Statutes of Arizona, paragraph 2184, *supra*, provides that the judge “may, in his discretion, order drawn a grand jury from the regular list.” Paragraph 2196, *supra*, provides that “where jurors are not drawn and summoned in the manner hereinbefore prescribed to attend any district court, or a sufficient number fail to appear, such court may, in its discretion, order a sufficient number to be drawn forthwith and summoned to attend said court; or it may, by an order entered on its minutes, summon as many to serve as grand or trial jurors as the case may require.” A grand jury, summoned by an order of court, on the application of the district attorney, from the body of the county, is within the provisions of the statutes and legal.
2. SAME — JURORS — CHALLENGES — APPEAL AND ERROR — RECORD MUST DISCLOSE INJURY—HARMLESS ERROR.—Where error is predicated upon the refusal of the trial court to sustain a challenge to a juror, the record should disclose that the defendant exhausted his peremptory challenges upon the panel, and that he was compelled to exercise one of them upon the objectionable juror; otherwise, it must be presumed that the defendant was not injured.
3. SAME—SAME—DISQUALIFIED — BIAS AND PREJUDICE — UNKNOWN AT TRIAL—GROUND FOR NEW TRIAL.—When it clearly appears that a juror was disqualified by reason of bias or prejudice, and the fact of his disqualification was not known until after the trial it is the duty of the court to grant a new trial, especially when the juror may have been examined as to his qualification, and failed to disclose the fact which disqualified him.
4. SAME—SAME—SAME—SAME—FACTS SHOWING—NEW TRIAL GRANTED.—In a murder trial, when a juror has upon his *voir dire* qualified, but it is shown afterward by affidavit that prior to the trial he had used the following language to affiant: “That there are so many married men whose wives are loose characters, and single men will get around them, and get the best of them, and their husbands will make gun-plays,” and that he did not believe in it, and from what he had heard and read about the case he was satisfied that the defendant was guilty, and it is further shown that defendant had no knowledge of these facts prior to the trial, the juror was disqualified, and a new trial should be granted.

5. SAME—SAME—SAME—NEW TRIAL—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1759, CONSTRUED.—Section 1759 of the Penal Code, *supra*, though not especially mentioning the disqualification of a trial juror as a ground for new trial, after enumerating the various causes, provides for cases, "where any good cause exists other than those in this section enumerated," and is broad enough to include a case of this character.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Edmund W. Wells, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Hawkins, James H. Wright, and R. M. Ling, for Appellant.

Upon the proposition that it was error for the court to summon a special grand jury the following cases are cited: *Wilson v. State*, 32 Tex. 112; *Vanhook v. State*, 12 Tex. 252; *Hudson v. State*, 40 Tex. 13; *Jackson v. State*, 11 Tex. 252; *State v. Foster*, 9 Tex. 66; *State v. Jacobs*, 6 Tex. 100; American Criminal Law, (Wharton, 5th ed.), secs. 468, et seq.; Bishop on Criminal Procedure, secs. 748-749; *Daniel v. Bridges*, 73 Tex. 150, 11 S. W. 121; *People v. Devins*, 46 Cal. 46; *People v. Williams*, 43 Cal. 344; *People v. McDonell*, 47 Cal. 134; *People v. Ah Chung*, 54 Cal. 400.

The juror Martin Crouse, upon his examination as to his qualifications as a juror, by his answers to the questions put to him, brought himself clearly within the rule. After the trial we filed the affidavit of Bennett, a citizen of Yavapai County, stating that Crouse had said that he believed the defendant was guilty. An affidavit of defendant was also filed stating that defendant had not known of this previous to the trial. The affidavit of Mr. Bennett was not controverted or denied in any way, either by the juror Crouse, or any one in his behalf, and the said juror was wholly disqualified under the law to serve in this case. Pen. Code, par. 1624, subd. 13; *State v. Brown*, 15 Kan. 304.

Under the law the defendant is entitled to have every juror before whom he is tried perfectly free from bias and prejudice; further, that each juror should be of such a condition of mind as to act with entire impartiality, and particularly is

this so in murder trials. *Cancemi v. People*, 16 N. Y. 501; *Ray v. State*, 15 Ga. 223; *People v. Williams*, 6 Cal. 207; *Schoeffler v. State*, 3 Wis. 823.

Robert Brown, District Attorney, and Baldwin & Johnston, for Respondent.

SLOAN, J.—The defendant was indicted, tried, and convicted in the district court of Yavapai County for the crime of murder. His motion for a new trial having been overruled, defendant appeals to this court. Numerous errors are assigned, the more important of which we will consider.

A challenge was interposed by the defendant to the panel of grand jurors which found the indictment upon which the defendant was tried, upon the ground that the jurors were not drawn from the regular jury list on file with the clerk, but were summoned by an order of the court, on application of the district attorney, from the body of the county. The record discloses that at the opening of the court a grand jury was in attendance, which, by the order of the judge duly made and entered, had been drawn and summoned as provided by paragraphs 2184 and 2185, inclusive, of the Revised Statutes. Said grand jury, after serving as such, was discharged by order of the court. Subsequently, and during the term, another grand jury was summoned on an open venire, impaneled, and charged by the court. The indictment on which the defendant was tried and convicted was found by this special grand jury. The contention of the defendant is, that the latter grand jury was illegal, for the reason that the court had no power to order a grand jury otherwise than is provided in said paragraph 2184 of the Revised Statutes. We are unable to interpret the statutes as limiting the power of the court in calling a grand jury to the one mode provided in said paragraph. At common law, a court possesses the power of directing the summoning of a grand jury upon an open venire whenever, in the discretion of the court, it be found necessary. The statutes ought not, therefore, unless the legislative intention appears otherwise, to be so construed as to deprive the court of this power. *Mackey v. People*, 2 Colo. 13; *Levy v. Wilson*, 69 Cal. 105, 10 Pac. 272; *Wilson v. State*, 32 Tex. 112; *White v. People*, 81 Ill. 333; *State v. Marsh*, 13 Kan. 596. Paragraph 2184 provides that the judge "may, in his

discretion, order drawn a grand jury from the regular list." Again, paragraph 2196 provides that "where jurors are not drawn and summoned in the manner hereinbefore prescribed to attend any district court, or a sufficient number fail to appear, such court may, in its discretion, order a sufficient number to be drawn forthwith and summoned to attend said court; or it may, by an order entered on its minutes, direct the sheriff of the county forthwith to summon as many good and lawful men of his county to serve as grand or trial jurors as the case may require." We think it plain from the foregoing provision of the statute that it is left to the discretion of the court either to order a grand jury to be drawn from the regular grand jury list or to be summoned upon an open venire from the body of the county, as was done by the court in this case.

As to the challenge interposed by the defendant to the juror Bowder, we think, from the answers of the witness, given upon his examination on *voir dire*, that the challenge was well taken, and that he should have been excluded from the jury. The record, however, discloses that the juror was excused at some time before the jury was sworn, but whether by the defendant or the territory does not appear. Before we could find this ruling of the court to have been reversible error the record should disclose that the defendant exhausted his peremptory challenges upon the panel, and that he was compelled to exercise one of them upon the objectionable juror, otherwise it must be presumed that the defendant was not injured by the ruling of the court.

One of the grounds upon which the defendant relied in his motion for a new trial was the disqualification of one of the jurors, which did not appear until after the trial. In support of his motion defendant produced and read the affidavit of one Charles Bennett to the following effect: That some time prior to the trial of the defendant he, Bennett, had a conversation with the juror Martin Crouse in relation to the charge against the defendant, to wit, the killing of George Johnson, in Prescott, in October, 1890. That in said conversation the said Crouse used the following language in substance, to wit: "That there are so many married men whose wives are loose characters, and single men will get around them, and get the best of them, and their husbands will make

gun-plays," and that he did not believe in it; and from what he had heard and read about the case he was satisfied that John Chartz was guilty of having done said killing. The defendant also made affidavit that the facts stated by Bennett were unknown to him, and were not communicated to him by said Bennett, or by any one, prior to the trial, nor until after said affidavit was made by said Bennett. No other affidavit was filed, or other proof taken, as to the proof of the fact alleged by Bennett. The records disclose that the juror Crouse was examined upon *voir dire*, and gave the following answers to the questions put to him: "Question. Do you know defendant?—Answer. Yes, sir.—Q. Did you know George Johnson?—A. Yes, sir.—Q. Have you heard the facts, or what purports to be the facts, of this case?—A. No, sir.—Q. Have you formed or expressed any opinion as to the guilt or innocence of the defendant?—A. I have formed an opinion.—Q. From what you have heard?—A. Yes, sir.—Q. What kind of an opinion is that? Is it qualified or unqualified?—A. Qualified.—Q. Is it a fixed opinion?—A. No, sir.—Q. Is it such an opinion as would influence or control you in making up a verdict in this case?—A. No, sir.—Q. Could you render your verdict in accordance with the law and the evidence without any regard to that opinion you have formed?—A. Yes, sir.—Q. You live on Cherry Creek?—A. Turkey Creek.—Q. You were not in town at the time that this occurrence took place?—A. No, sir.—Q. Were you at any of the trials?—A. No, sir.—Q. Have you any bias or prejudice against this defendant?—A. No, sir.—Q. Do you know of any reason that would bias or prejudice you or disqualify you in any way for this trial of this cause?—A. No, sir." If the facts as stated by Bennett be true (and it is to be observed that they were not denied), then Crouse was wholly unfit to serve as a juror in this case; and had this appeared upon his examination, the court no doubt would have excluded him from the jury. As seen by his answers, nothing in his examination appeared which indicated the true state of the juror's mind, and which was calculated to lead either the court or the defendant to believe that he was other than an impartial juror. There can be no question but that the law favors the granting a new trial when it clearly appears that one of the jurors was disqualified by reason of bias or prejudice, and the fact of his disqualification

was not known until after the trial. Indeed, the authorities are unanimous that it is the duty of the court to grant a new trial in such a case, especially when the juror may have been examined as to his qualification, and failed to disclose the fact which disqualified him. *People v. Plummer*, 9 Cal. 310; *State v. Burnside*, 37 Mo. 347; *Busick v. State*, 19 Ohio, 198. Our statute, while not especially mentioning the disqualification of a trial juror as a ground for a new trial, is broad enough to include a case of this character. Section 1759 of the Penal Code, after enumerating the various causes for which a new trial may be granted, provides, in addition, for a case "where any good cause exists other than those in this section enumerated." We are strongly of the opinion that the existence of the state of mind on the part of the juror Crouse entertained prior to the trial towards the defendant, and his unqualified expression of his belief in the defendant's guilt, as disclosed by the affidavit of Bennett, is good cause, within the meaning of the statute. Quoting the language of the court in *People v. Plummer*, 9 Cal. 310: "One of the dearest rights guaranteed by our free constitution is that of trial by jury,—the right which every citizen has to demand that all offenses charged against him shall be submitted to a tribunal composed of honest and unprejudiced men, who will do equal and exact justice between the government and the accused, and, in order to do this, scan impartially every fact disclosed by the evidence." This guaranty, being regarded as of inestimable value, would be entirely worthless if persons are to be admitted in the jury-box who are influenced by passion, ill-will, or prejudice, or who, by reason of having formed an opinion as to the merits of the case, will be incapable of judging with impartiality. We hold, therefore, the showing sufficient to have entitled the defendant upon this ground alone to a new trial.

We deem it unnecessary to consider such of the assignments of error as relate to the conduct of the trial, the admission of evidence, and the giving or refusing of instructions, for the reason that, if any error was committed, it will doubtless be corrected by the learned judge who tries the case at the next trial of the cause. Judgment reversed, and the cause remanded for a new trial.

Gooding, C. J., and Kibbey, J., concur.

[Civil No. 323. Filed January 25, 1893.]

TERRITORY OF ARIZONA, Appellee, v. THE DELINQUENT TAX-LIST OF THE COUNTY OF YAVAPAI FOR THE YEAR 1889. Appeal of John C. De la Vergne.

TAXES AND TAXATION — PUBLIC LAND — VALENTINE SCRIP — 17 U. S. STATS. AT LARGE, 649, CITED AND CONSTRUED.—Public land, selected by the owner of Valentine scrip, issued pursuant to statute, *supra*, is subject to taxation under the tax-laws of the territory, as after selection the United States is but a mere depositary of the title and a trustee for the owner of the scrip.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Henry C. Gooding, Judge. **Affirmed.**

The facts are stated in the opinion.

Wilson & Norris, for Appellant.

J. C. Herndon, Attorney-General, for Appellee.

KIBBEY, J., speaking for the Court.

The court below rendered judgment against a forty-acre tract of land owned by La Vergne for the taxes for 1889, amounting to \$221.50.

La Vergne appeals, and here insists that the land in question is not subject to taxation.

In pursuance of the act of Congress of 1872, entitled "An act for the relief of Thomas B. Valentine" (17 Stats. at Large, sec. 649), the commissioner of the general land office issued Valentine scrip. By the act this scrip entitled Valentine or his legal representatives to appropriate the quantity of unoccupied and unappropriated public land mentioned in the scrip. The scrip was issued for legal subdivisions of the public survey presumably in forty-acre tracts.

The act provides that the claimant (Valentine) or his legal representatives might select and should be allowed patents for an equal quantity (that is, equal to the quantity of a certain Mexican grant, in lieu of which the scrip was issued) of the

unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and if unsurveyed when taken to conform when surveyed to the general system of the United States land surveys.

La Vergne became the owner of certain of the Valentine scrip enabling him to select forty acres of land. He selected the forty acres, upon which the disputed tax was levied, out of unsurveyed lands. He or his legal representatives will be entitled without any further act upon his or their part to a patent to that forty acres, subject, possibly, to a shifting of his boundary-lines to make them conform to the United States survey when that shall be made.

Subject to that possible shifting of boundary-lines, he is now the owner of that forty acres. It is the subject of grant by himself, of mortgage, and may be taken upon execution against him.

The legal title, it is true, is yet in the United States, but the United States is the mere depositary of the title, and but a trustee. No right of the United States remains in or to the land, and none could be divested by sale for taxes or by any other sale. The enforcement by the territory of its tax lien in no wise interferes with the summary disposal by the United States of its public lands. It seems to us clearly subject to taxation.

The judgment will therefore be affirmed.

Gooding, C. J., and Sloan, J., concur.

[Civil No. 338. Filed January 28, 1893.]

[32 Pac. 261.]

LOUIS LEIBES et al., Defendants and Appellants, v.
NELLIE E. STEFFY, Plaintiff and Appellee.

1. STATUTORY CONSTRUCTION — INTENT CONTROLS — WHOLE STATUTE MUST BE CONSIDERED.—In the construction of a statute it is the intent and purpose of the law, not the letter, that must control; and the whole statute must be considered.

2. HUSBAND AND WIFE—SEPARATE ESTATE—PURCHASE BY WIFE—"ACQUIRED" AS USED IN REV. STATS. ARIZ. 1887, TIT. 34, CH. 3, SEC. 17, CONSTRUED.—The word "acquired," in section 17, *supra*, providing that "all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife while," etc., "shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband alone," was not intended to include a purchase made by the wife with her separate money or property.
3. SAME—SAME—PERSONAL PROPERTY—REAL PROPERTY—ACQUIRED BY WIFE BY PURCHASE OR EXCHANGE MAY BE HELD AS SEPARATE PROPERTY.—A married woman may, under the laws of this territory, by purchase or exchange, acquire personal property or real property and hold the same as her separate property.
4. SAME—SAME—PERSONAL PROPERTY PURCHASED BY WIFE WITH HER SEPARATE PROPERTY—NOT SUBJECT TO EXECUTION AGAINST HUSBAND.—Cattle, separate property of husband, purchased by wife from him, at the full price, with money which was her separate property, become her separate property, and are not subject to execution on a judgment against the husband, the good faith of the transaction not being questioned.
5. FRAUD—TRANSFERS—PERSONAL PROPERTY—WANT OF IMMEDIATE DELIVERY ONLY PRIMA FACIE EVIDENCE OF FRAUD—REV. STATS. ARIZ. 1887, TIT. 30, SEC. 5, CITED—FRAUD QUESTION OF FACT—REV. STATS. ARIZ. 1887, TIT. 30, SEC. 8, CITED.—Where a wife purchased cattle belonging to her husband which were in possession of a third party, who was notified of the purchase, but continued in possession till the following spring, when the cattle were delivered to her, and at the time of purchase a bill of sale was executed and duly recorded, such sale is not, as a matter of law, fraudulent as against creditors, because there is no actual change of possession and immediate delivery, section 5, *supra*, providing that, unless there is immediate delivery, etc., it is "*prima facie* evidence of fraud," and section 8, *supra*, providing that the question of fraudulent intent shall be deemed a question of fact, and not of law.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

H. V. Jackson, for Appellants.

W. R. Stone, for Appellee.

GOODING, C. J.—Appellants obtained a judgment against William Steffy, the husband of appellee, in the sum of \$156.42, on the 8th of June, 1889. Subsequently an execution was issued on said judgment, and levied upon fifty head of cattle of the “22” brand as the property of William Steffy. Nellie B. Steffy (appellee) claimed said property as her separate property, and instituted proceedings to try her right thereto under the provisions of title 6, chapter 2, Revised Statutes of 1887, and filed bond as required, and took possession of said fifty head of cattle. The court below held that she was the owner of said cattle, and entitled to hold the same. The statement of facts and the evidence therein shows that William Steffy was a copartner with one Desmond, and the owner, before his marriage to appellee, of one half of the cattle branded “22,” and so continued to be until the sale thereof to his wife, Nellie B. Steffy. That the consideration of said sale was thirteen hundred dollars, which was paid to him by his said wife, by a draft for that amount. The draft was drawn and payable to and indorsed by her father, James P. Rutledge. That the amount of the draft was a gift to her by her father. That thirteen hundred dollars was the fair value of the cattle bought by her. That at the time of the sale of his interest to his wife in said cattle, the cattle were in the exclusive control and management of his copartner, Desmond, and so remained till the following spring, when a division was made, and the share of Nellie B. Steffy was delivered into her possession, and of this share the fifty cattle levied upon under plaintiff’s execution were a part. That at the time of his sale to his wife he had no intent to cheat, hinder, or delay his creditors, and that thirteen hundred dollars was the full, fair cash value of the cattle sold by him to his wife; and that the sale was, in short, without any intent on the part of Steffy, or his wife, Nellie B. Steffy, to cheat, hinder, or delay creditors.

The motion for a new trial in this case sets up the following grounds: 1. That said judgment is contrary to law in this case; that the court decides that a married woman can purchase personal property, and hold the same as her separate property; 2. That the wife, during coverture, may purchase personal property from her husband, and thereby withdraw such property from the payment of the husband’s debts; 3.

That the court erred in ruling that the sale of the personal property in this case was valid, notwithstanding the fact that when the same was made there was no immediate delivery thereof, and no change in the possession of such property, continued or otherwise; and 4. That the judgment of the court is and was contrary to the law and the evidence.

That a married woman can purchase personal property, and hold the same as her separate property, we think it quite clear. It is true that section 17, chapter 3, title 34, provides that "all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife while," etc., "shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband alone." Section 18 provides: "Married women of the age of twenty-one years and upwards shall have sole and exclusive control of their separate property, and the same shall not be liable for the debts, obligations, or engagements of the husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by them in the same manner, and with like effect, as if they were unmarried." This last section gives the power to contract, sell, mortgage, convey, etc., "in the same manner, and with like effect, as if they were unmarried." To give the wife this plenary power to contract, sell, and convey her separate property without requiring even the consent of her husband, is not consistent with the idea that what she may receive in return for her separate property shall immediately become the common property of husband and wife. Section 19 provides as follows: "Hereafter married women of the age of twenty-one years and upwards shall have the same legal rights as men of the age of twenty-one years and upwards, except the right of suffrage and holding office, and with the right to make contracts binding the common property of husband and wife," etc. It is the intent and purpose of the law, not the letter, that must control; and the whole statute must be considered. This word "acquired," in section 17 above set out, was not intended to include a purchase made by the wife with her separate money or property. Such a construction would be very unjust, and contrary to the spirit of the statute, as well as the drift of all modern legislation. We are clearly of the opinion that a married

woman may, by purchase or exchange, acquire personal property or real property, and hold the same as her separate property. In this case the interest of the husband in the cattle was purchased by the wife with property, a gift to her by her father, and a full price paid to him (the husband) therefor. The interest in the cattle owned by the husband was acquired by him before his marriage to appellee. The property was therefore the separate property of the husband before the sale to the wife, and became and was her separate property thereafter. A bill of sale was given, and duly recorded, and the *bona fides* of the transaction is not questioned.

But it is further claimed by appellant that the title did not pass, because there was no immediate delivery. The statement of facts shows that she (Nellie B. Steffy) testified (and there was no evidence to the contrary) "that immediately upon the sale she notified Desmond of her purchase; that Desmond continued in possession of the cattle until the following spring, when a division was made, and her share thereof was delivered to her; that of this share the fifty cattle levied on are a part." A bill of sale was executed and duly recorded at the time of the purchase, but it is claimed that there must be an actual change of possession and immediate delivery, or the sale will, as matter of law, be held fraudulent as against creditors. Section 5 of title 30 expressly provides that, unless there is immediate delivery, etc., it is "*prima facie* evidence of fraud." If *prima facie* only, the facts may overcome the "*prima facie* evidence." Section 8 of the same title provides: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, and not of law." The judgment of the court below should be affirmed. It is so ordered.

Sloan, J., and Wells, J., concur.

[Civil No. 333. Filed January 25, 1893.]

[32 Pac. 265.]

PIERCE W. BUTLER, Administrator of the Estate of Georgia Butler, Deceased, Plaintiff and Appellant, v. **TRINIDAD SHUMAKER et al.**, Defendants and Appellees.

1. **TRUSTS—EVIDENCE—MAY BE ESTABLISHED IN REAL ESTATE BY PAROL—MUST BE CONVINCING.**—A trust in real estate may be established by parol evidence, but such evidence must be clear and convincing, not doubtful, uncertain, and contradictory.
2. **SAME—BURDEN OF PROOF—APPEAL AND ERROR—CONFLICT IN EVIDENCE.**—The burden of proof is upon the one seeking to establish a trust in real estate, and where the evidence is conflicting, under well-established rules, the judgment of the trial court, that there was no trust, will not be disturbed.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Henry C. Gooding, Judge. Affirmed.

The facts are stated in the opinion.

A. Buck, for Appellant.

H. N. Alexander, for Appellee.

WELLS, J.—Action in equity to establish a trust in defendant Trinidad Shumaker of certain real estate situate in the city of Phoenix, in this territory, for the benefit of plaintiff, Georgia Butler. Also to decree as a mortgage a certain deed given by said Trinidad to the defendant H. Shumaker, conveying the said real estate; to permit plaintiff to pay the alleged mortgage debt; and to decree the title of the said property in plaintiff. There was a trial by the court, and a judgment for the defendants, from which and the order overruling the motion for a new trial plaintiff appeals.

The first assignment of error is, that the court erred in overruling the motion for a new trial, for the reason that the verdict and judgment of the court is contrary to the law

and the evidence. Notwithstanding the assignment is general in its character, we pass over any objection thereto, and consider the questions raised by the assignment. The first question presented by the plaintiff for the district court to determine was, Did the evidence adduced at the trial establish a trust alleged and relied upon in the complaint? In fact, this is the first step to be taken by plaintiff leading to a recovery. The facts upon which the trust is sought to be established, summarized from the testimony appearing in the record, are substantially as follows: On the part of the plaintiff it appears that in the month of September, 1879, the plaintiff, Georgia Butler, whose maiden name was then Georgia Swilling, and who is the daughter of the defendant Trinidad Shumaker, was the owner of about thirty head of cattle of the value of about five hundred dollars; that at about that time said Trinidad traded, sold, and delivered said cattle to one Woolsey, who, in consideration therefor, was to transfer the real estate in question, and finish the house thereon; that in the year 1880 Woolsey died, without having made the transfer; his estate was administered upon, the administrator in due course of his administration selling the property in question at public sale; that said Trinidad purchased the property at said sale for the sum of eleven dollars, and took a deed to herself and in her name. The testimony for plaintiff, taken alone, tended to establish plaintiff's theory that the defendant Trinidad, in the transaction just indicated, was acting for and in behalf of the plaintiff, Georgia Butler. The defendant Trinidad Shumaker testified that she was a widow, having certain property after the death of her husband; that the cattle traded and sold by her to Woolsey for the real estate in question belonged to her; that she purchased them from a Mrs. Stevens, paying for them with her own property; that she traded them to Woolsey as her own and in exchange for the real estate to procure a home for herself; that, in addition to the lots, Woolsey agreed to build a house for her on the lots, which he commenced, but died before finishing; that she finished the house herself, and has lived in it and occupied it for twelve years, and since the purchase from Woolsey. After the death of Woolsey, at her instance, Captain Hancock attended to the business of finishing the house and completing the title, and

he purchased the property for her at the administrator's sale. The witnesses for the plaintiff and the defendants testified at some length, and the evidence in its entirety is contradictory and uncertain; the plaintiff's witnesses testifying to facts which are denied and contradicted by defendant Trinidad, who is corroborated in a measure by other evidence.

There is some contention between counsel as to the character or nature of trusts. We do not consider it important whether there was a resulting or constructive trust in this case. The facts to be established are, Was there a trust, and has plaintiff sufficiently established it? It is conceded that the trust is not in writing, but rests in parol, and, resting in parol, the proof in character is the same whether to establish a resulting or constructive trust. A trust may be established by parol evidence, but such evidence must be clear and convincing, not doubtful, uncertain, and contradictory. It must be full, clear, and satisfactory. The burden of proof is upon the one seeking to establish it, and, if the testimony is conflicting, under the well-established rules the judgment of the lower court will not be disturbed. The judgment of the lower court was for the defendants, for the reason that plaintiff failed in the evidence to establish a trust, it devolving upon him to produce sufficient and satisfactory proof; and what is sufficient and satisfactory proof is for the trial court to determine. We have looked into the whole evidence. Upon important points it is contradictory and conflicting. In its state we cannot say that the judgment of the district court was not authorized, even should it appear to us that the preponderance of the evidence was in favor of the plaintiff. It devolved upon the trial court to weigh the evidence, and to pass upon the credibility of the witnesses, who were personally before it; and if he believed one rather than the other, we have no right of determining that his conclusions were wrong. We can only reverse when there is a want of evidence to sustain the judgment, or when the judgment is so manifestly against the weight of evidence as to show it to be the result of bias or prejudice. When the decree sought to be reversed is based upon depositions which are so conflicting and of such a doubtful and unsatisfactory character that different minds and different judges might reasonably

disagree as to the facts proved by them, or the proper conclusions to be deduced therefrom, the appellate court will decline to reverse the decree, although the testimony may be such that the appellate court might have rendered a different decree if it had decided the case in the first instance. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 278; *Clift v. Clift*, 72 Tex. 144, 10 S. W. 339; *Sprague v. Locke*, 1 Colo. App. 171, 28 Pac. 142. This doctrine is so well established that we need cite no further authorities. The plaintiff failing to establish a trust estate, there is no necessity for inquiring into the merits of the deed from Trinidad Shumaker to H. Shumaker. We have come to the conclusion that the judgment of the lower court must be affirmed, which is accordingly done.

[Civil No. 329. Filed January 25, 1893.]

[33 Pac. 619.]

DELOS ARNOLD, Plaintiff and Appellant, v. WILLIAM CHRISTY, Defendant and Appellee.

1. PUBLIC LANDS—DESERT LAND ACT—CONTRACT TO CONVEY AFTER PATENT ISSUES—VALIDITY.—An agreement may be lawfully entered into by one holding a desert land entry to convey the title to the same when patent shall have been obtained. Such contract does not contemplate a violation of any of the provisions of the desert land laws as to the requirements necessary to obtain title, or restricting the quantity of land which may be acquired by any one person under it, nor a violation of any ruling of the land department which has the effect of law.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Reversed.

The facts are stated in the opinion.

H. B. Lighthizer, for Appellant.

The contract sued upon is not invalid.

Contracts against public policy, though equally void, are divisible into two classes, viz.: Contracts involving the per-

formance of acts *malum in se*, and contracts proposing certain acts to be done which are *malum prohibitum*. Greenhood on Public Policy, pp. 126-127; *Martin v. Wade*, 37 Cal. 168; *Bank of United States v. Owens*, 2 Pet. 538; *Marshall v. Baltimore R. R. Co.*, 16 How. 334. Hence it follows that contracts contemplating some act prohibited by the statutes of the state or of the United States are void, as against public policy. Greenhood on Public Policy, rule 451, p. 529; *Harris v. Runnels*, 12 How. 79; *Kennet v. Chambers*, 14 How. 38.

Contracts with regard to public lands are valid except where Congress has imposed restrictions on such contracts. *Marks v. Dickson*, 20 How. 504; *Thredgill v. Pintard*, 12 How. 24; *Meyers v. Croft*, 13 Wall. 295; *Lamb v. Davenport*, 18 Wall. 307; *Davenport v. Lamb*, 13 Wall. 418; *Sparrow v. Strong*, 3 Wall. 97.

In determining whether or not the contract in question comes within the purview of any statutory prohibition, the following rules of construction of contracts against public policy should govern, viz.:—

1. That a contract otherwise valid is not or does not become void because it will, by its abuse, operate to public injury; nor because it may in a contingency result in violating a prohibition imposed by statute, but contemplates no such violation; nor because the promisee (or promisor) induced the belief in the mind of the promisor (or promisee) that he would do something opposed to public policy. Greenhood on Public Policy, rule 30, pp. 27-29, and cases there cited.

2. That a contract to transfer property is not invalid because the title of the promisor is derived from some contract which is void as against public policy. Greenhood on Public Policy, rule 31, p. 30, and cases cited.

3. That a contract to pay for property bought is not invalid because the vendor acquired it by a transaction opposed to public policy. Greenhood on Public Policy, rule 32, p. 30, and cases cited.

4. That when a contract is valid in the absence or existence of certain facts, but otherwise void, it is in the absence of evidence presumed to be valid, and the burden of proving the absence or existence of such facts lies upon him asserting its invalidity. Greenhood on Public Policy, rule 130, pp. 116-119. The case of *Richards v. Snider*, 11 Or. 197, 3 Pac.

177, and 11 Or. 501, 6 Pac. 186, applies this rule directly to contracts relative to public lands.

5. That if a contract will bear two constructions, that which will uphold its validity will be preferred to that which would avoid it by reason of its repugnancy to public policy. *Greenhood on Public Policy*, rule 139, p. 123.

The contract in question has no relation to either pre-emption or homestead entries, but contemplates the sale of lands entered under the Desert Land Act of March 3, 1877. Since its passage up to the time of the commencement of this suit the Desert Land Act had not been amended, and contained no restrictions, either upon the assignment of the entries themselves or upon the alienation of the lands covered thereby. Therefore, under the general rules governing the application of the principles of public policy generally, and in the light of their application by courts to contracts relating to public lands, and particularly to entries under the Pre-emption and Homestead acts, the correct rule is: That any contract, made either before or after entry under the Desert Land Act, and more particularly (as in this case) if made after the entry and payment of the twenty-five cents per acre, and before the final payment, for the conveyance of the land after patent, not necessarily by its terms having in contemplation the violation or the evasion of the *express terms* of the act itself, is valid, and a specific performance may be enforced by either party thereto.

The decisions of the land office recognize this as the correct rule. *Lanktree v. Vibrans*, decided by Commissioner Sparks, 13 Copp, Landowner, 220.

Webster Street, for Appellee.

SLOAN, J.—Appellant, Delos Arnold, brought suit against appellee, William Christy, to recover the sum of twenty-five hundred dollars, paid by him to appellee upon a contract for the purchase of certain lands. The following is a copy of the contract:—

“This agreement, between William Christy, of Phoenix, Ariz., and Delos Arnold of Pasadena, Calif., is as follows: Wm. Christy promises to pay all expenses, and patent Sec. 13, T. 2 N., R. 1 E., Gila & Salt River M.,—said section 13 being located about ten miles from Phoenix, Ariz., in N. W.

direction,—and deed the same to said Arnold, for fourteen thousand dollars, on or before ninety days from this date. Said Arnold promises to pay said Christy twenty-five hundred dollars as part payment on this contract; and if said Christy fails to get final papers, & deed said lands to said Arnold, then said Christy is to return said Arnold the above-mentioned twenty-five hundred dollars. And it is further agreed that when the title to said section 13 is acquired, & conveyed to the said Arnold, then he, the said Arnold, shall pay to the said Christy the final sum of eleven thousand five hundred dollars; and said Arnold is to be at no expense in procuring above title. WILLIAM CHRISTY. DELOS ARNOLD. May 21, 1887.

“Eight water-rights in the Arizona Canal Co. go with the above described land, and are to be deeded to the land, and become a part of the same. WM. CHRISTY.”

The complaint alleged a breach of this contract, and a failure to return the twenty-five hundred dollars advanced by appellant, as provided therein, and prayed judgment for that amount, with interest. The appellee in his answer denied any breach of said contract on his part, but charged a breach on the part of appellant, by reason of which appellee was profited nothing by the receipt of the money sued for. The court below held the contract in question to be illegal and void, as against public policy,—it relating to public lands of the United States, and contemplating by its terms a violation of the laws in relation thereto,—and upon this ground charged the jury to find for the defendant.

It must be conceded that any contract which contemplates some act on the part of either party which is prohibited by the statutes of the United States, or which necessarily implies some fraud upon the government, in the procurement of its lands, must be held void as against public policy; and under the familiar rule that courts will not enforce any part of an illegal contract, known and understood to be such by the parties thereto, money advanced under such an agreement cannot be recovered. It was shown by the evidence in this case that the contract above set forth had reference to a section of land held under the Desert Land Act of 1877. The first question to be determined is, then, May an agreement be lawfully entered into by one holding a desert land entry to convey title to the same when patent shall have been obtained? The

Desert Land Act of 1877 contains nothing which in express terms can be construed as directly prohibiting such agreements. Indeed, until 1880 assignments of desert land entries were recognized by the land department of the government, and the assignees of such entries were permitted to make final proofs, and the patents issued were made out in the names of such assignees. On April 15, 1880, Secretary of the Interior Schurz ruled that such entries were not assignable, basing his ruling upon the technical ground that the Desert Land Act provided that the entryman should make oath at the time of entry that he intended to reclaim the land, and that upon such proof the patent should issue to him. This ruling was subsequently modified by Secretary Teller on December 1, 1884, to the extent of permitting assignees of desert lands, when the assignments were made prior to April 15, 1880, the date of Secretary Schurz's ruling, to make final proof. Again, Secretary Lamar, in passing on this question in 1886, concurring in the ruling of his predecessor, Secretary Teller, stated that an examination of the Desert Land Act itself "develops nothing which in terms either authorizes or prohibits assignments," and added further that it was "a matter of construction, or, more correctly speaking, of administration policy, and a question which has been involved in some doubt." It is to be noted that these rulings had reference to the right to assign desert entries, when the assignees sought the right to make final proof and obtain patents in their own names, and were upheld on the ground that to permit such assignments would open the way to persons to obtain a greater quantity of land than was permitted by said act to any person, which was directly limited to six hundred and forty acres. We know of no ruling of the land department holding that one who has entered desert lands in good faith may not make an agreement to convey the land after title shall vest in him. On the contrary, the land department has affirmatively recognized such agreements as valid, and as not affecting the rights of the entryman to obtain title. In the case of *Lanktree v. Vibrans*, decided by Commissioner Sparks, and reported in 13 Copp, Landowner, 220, of January 1, 1887, it was held that such an agreement was not an assignment of the entry, and not prohibited by any ruling of the department. We are unable to see wherein the contract in question by its terms

contemplated any violation of any of the provisions of the desert land laws as to the requirement necessary to obtain title, or restricting the quantity of land which may be acquired by any one person under it, nor any violation of any ruling of the land department which has the effect of law. The charge of the court below, that the plaintiff could not recover, for the reason that the contract was illegal and void, was therefore, in our opinion, error; and for this reason the judgment is reversed and the cause remanded for a new trial.

[Civil No. 330. Filed January 25, 1893.]

[33 Pac. 712.]

W. T. GRAY et al., Defendants and Appellants, v. WILLIAM H. ROBINSON, Plaintiff and Appellee.

1. CROPPER'S CONTRACT.—A contract between plaintiff and Thomas, whereby plaintiff agreed to furnish land, water, and seed, and Thomas agreed to sow, irrigate, cultivate, harvest, thresh, and sack all grain grown at his own expense, and that title should remain in the plaintiff until certain portions of the grain were delivered to the plaintiff, and that then, and not before, the remainder should be paid to Thomas, and that at all times the land should be deemed in the possession of plaintiff, and if Thomas failed to perform his part of the contract in a diligent and workmanlike manner, plaintiff might perform the same himself, and all rights of Thomas thereupon should cease, does not create the relation of landlord and tenant, but is a "cropper's" contract.
2. SAME—LEASE—DETERMINATION DEPENDENT UPON WHETHER OR NOT INTEREST IN LAND IS CREATED—ROMERO v. DALTON, 2 ARIZ. 210, 11 PAC. 863, CITED.—The character of a contract to cultivate land on shares is to be determined by ascertaining the intention of the parties as expressed in the language used. If it imports a present demise of any character by which any interest in the land passes to the occupant the contract becomes one of lease; if, on the other hand, there be no such language, but by the express terms of the contract the general possession of the land is reserved by the owner, the occupant becomes a mere cropper, and the relation of master and servant exists between him and the owner. *Romero v. Dalton*, *supra*, cited.
3. SAME—EXECUTION—LEVY—INTEREST OF CROPPER.—A cropper being a mere servant of the owner, has no such interest in the grain as to

render it liable to execution for his debt so long as it remains *en masse*.

4. **CLAIM AND DELIVERY—SUPPLEMENTAL ANSWER—SUBROGATION—JUDGMENT CREDITOR CANNOT BE SUBROGATED TO DEBTOR'S RIGHTS.**—In an action of claim and delivery against a judgment creditor of a cropper and sheriff, to recover grain wrongfully levied upon, a supplemental answer and cross-complaint, filed after the cause had been submitted, attempting to set up the cropper's interest in the grain as against plaintiff, and asking that he be made a party, to the end that his rights be determined and the judgment creditor subrogated thereto, is properly stricken out, on motion. The judgment creditor being a stranger to the contract, and the action being primarily one for delivery of possession of property to the one rightfully entitled thereto, he could not withhold possession from plaintiff under a claim that he was entitled to an accounting from plaintiff for what might be due the judgment debtor.
5. **SAME—VALUE OF PROPERTY—ASSESSMENT OF.**—In actions of claim and delivery, under a statute providing for an alternative judgment for the return of the property or payment of its value, the rule is to assess the value of the property at the time of trial rather than at the time of taking.
6. **SAME—SAME—DEDUCTION FOR LABOR.**—In actions of claim and delivery, as also in replevin, where the legal identity of the property has not been destroyed, the owner is entitled to recover the whole of it, or its full value, without any deduction for labor bestowed upon it.
7. **EXECUTIONS—LEVY — SHERIFFS — EXPENDITURES FOR BETTERMENT—DUTY TO SELL IN FORM AS SEIZED.**—Where grain in stack is levied upon, it is the business of the sheriff, under the writ, to sell the property in stack, and he is not justified in threshing or expending labor upon it not necessary for its preservation.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

H. B. Lighthizer, for Appellants.

Appellants contend that the instrument in question is a lease and chattel mortgage combined, and wholly incompetent as evidence of any title or ownership in the lessor and mortgagee, Robinson, in the crops raised upon the leased premises, because said instrument was not executed, proved, and recorded as a chattel mortgage.

The form of words in a lease is of no consequence, and it is not at all necessary that the term "lease" should be used. Whatever is equivalent will be equally available, if the words assume, as in this case, the form of a license, covenant, or agreement, and the other requisites of a lease are present. *Moore v. Miller*, 8 Pa. St. 272.

The contract contains all the essential elements of a lease,—viz., the letting of the premises for a definite period or term and at a definite and certain rental,—and necessarily creates the relation of landlord and tenant between Robinson and Thomas, unless it be found to contain conditions which destroy such relationship. 6 Lawson's Rights, Remedies, and Practice, secs. 2801-2803; 12 Am. & Eng. Ency. of Law, pp. 976, 977.

The trial court treated this instrument as a contract of hire, or what is known as a "cropping contract," whereby Robinson hired Thomas as his servant to cultivate the land, and agreed to pay him for his services a share of the crop raised, and, as a sequence, that the ownership and possession of the crop was in Robinson, while Thomas's possession was that of a servant.

Whether the possession is that of the servant or tenant is held to be a question of fact, and a contract between a landowner and a laborer, by which the latter is to raise a crop on the land of the former, creates the relation of landlord and tenant, unless the contrary clearly appears. *Birmingham v. Rogers*, 46 Ark. 254; 12 Am. & Eng. Ency. of Law, p. 664.

The facts in this case show that the elements of the relation of master and servant are entirely wanting in the contract. Such relationship involves a hiring, and hiring contemplates wages, and wages are necessarily certain and determinate, and proceed from the master to the servant, instead of, as in this case from the servant to the master.

Such relationship imports an unqualified control and authority upon the part of the master over the servant.

In this contract it is expressly stated that Robinson should not have any right to be dissatisfied with the work of the so-called servant, Thomas, or "interfere with" him, so long as he should prosecute his work with ordinary diligence and perform the same in a workmanlike manner, which work, it will be observed, includes his payment of rent to the master.

The terms are directly the reverse of those held by the courts to be "cropping contracts," in that the "cropper" takes no term in the land itself, has no control over the crops, and gains no property in his share thereof until the division, which is made by the landlord. See title "Cropper," 4 Am. & Eng. Ency. of Law, 887; 6 Lawson's Rights, Remedies, and Practice, p. 4572, n. 3.

Neither does this case come within the purview of the long line of decisions holding that such a contract is not a lease, and that, as to the crop raised, the owner of the land and the occupier are merely tenants in common.

Under this contract there is no division, properly speaking, of the specific crops provided for, since the setting aside of the fixed quantity of pounds of grain per acre for the landlord is in no sense a division of the crops into parts or shares; and this feature of the contract in itself settles the *status* of Thomas to be that of a tenant with exclusive ownership of the whole crop, until the fixed quantity due the landlord is set apart for him. *Dockman v. Parker*, 9 Greenl. 137, 23 Am. Dec. 547; *Chicago etc. Ry. Co. v. Linard*, 94 Ind. 319, 48 Am. Rep. 155; *Sargent v. Courier*, 66 Ill. 245; *Schmitt v. Cassilius*, 31 Minn. 7, 16 N. W. 453; *Strain v. Gardiner*, 61 Wis. 174, 21 N. W. 35.

The court erred in striking out the supplemental answer of the defendants. It is the duty of the trial court to grant amendments whenever at any stage of the trial they are necessary to the purposes of substantial justice, and this power should be liberally exercised to obtain a fair trial on the merits. Rev. Stats. Ariz., pars. 667, 689; *Stringer v. Davis*, 30 Cal. 318.

The fundamental law of damages is compensation for actual loss, and the court erred in excluding evidence tending to show the extent and nature of appellee's interest in the property he was seeking to recover.

The rule for the measure of damages in actions of claim and delivery or replevin, where the property claimed cannot be returned, and plaintiff takes judgment for its value, is, generally speaking, the same as in an action of trover. *Washington Ice Co. v. Webster*, 62 Me., 341, 16 Am. Rep. 463; *Hisler v. Carr and Jesse*, 34 Cal. 641.

When, as in this case, the plaintiff is successful, and a part

of the property is not found by the officer and has not been delivered, it has been repeatedly held that the measure of damages is the value of such undelivered part, with interest from the time of taking. *Wells on Replevin*, secs. 520, 539; *Booth v. Ableman*, 20 Wis. 602; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Brizce v. Maybee*, 21 Wend. 144; *Buckley v. Buckley*, 12 Nev. 423; *Aultman v. Stickler*, 21 Neb. 72, 31 N. W. 241.

And in Indiana, where the contest in replevin arose about the validity of a sale of personal property, the value thereof at time of seizure was regarded as the proper measure of damages. *Walls v. Johnson*, 16 Ind. 374.

Where property is taken by mistake, or under a *bona fide* belief of right, the defendant in trover is liable only for its value before he bestowed any labor or expense upon it, or he is allowed a deduction (as was claimed in this case) for such labor and expense, if the enhanced value is made the measure of damages, the latter rule being preferred. *Pulcifer v. Page*, 32 Me. 404, 54 Am. Dec. 582. *Coleman's Appeal*, 62 Pa. St. 523; *Clouser v. Joplin Mining Co.*, 4 Dill. 469, note; *Waters v. Stevenson*, 13 Nev. 157, 29 Am. Rep. 293; *Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. Rep. 489.

C. F. Ainsworth, for Appellee.

If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labor. The possession is still in the owner of the land, who alone can maintain trespass; nor can he distrain, for he does not maintain the relation of landlord and tenant. *Adams v. McKesson*, 53 Pa. St. 81, 91 Am. Dec. 183; *Porter v. Chandler*, 27 Minn. 301, 38 Am. Rep. 293; *Wentworth v. Miller*, 53 Cal. 9; *Parish v. Commonwealth*, 81 Va. 1; *Provis v. Cheves*, 9 R. I. 53, 98 Am. Dec. 367; *Hammock v. Creekmore*, 48 Ark. 264, 3 S. W. 180; *Romero v. Dalton*, 2 Ariz. 210, 11 Pac. 863; *Fox, Baum & Co. v. McKinney*, 9 Or. 493; *Andrew v. Newcomb*, 32 N. Y. 417; *Chase v. McDonnell*, 24 Ill. 237; *Mercies v. Adem*, 46 Ga. 583; *Sentell v. Moore*, 34 Ark. 687; *Pender v. Pease*, 32 Ark. 435.

Under the contract in question John M. Thomas and D. C. Clarahan, being mere croppers, and not having completed the contract on their part either before or after the levy of appellant's execution or up to the time of the trial, had no interest in the crop which could be subjected to the payment of their debts or rendered liable to execution against them. *Brazier v. Ansley*, 11 Ired. 12, 51 Am. Dec. 408; *Chandler v. Thurston*, 10 Pick. 205; *Lewis v. Lyman*, 22 Pick. 437; *Provis v. Cheves*, 9 R. I. 53, 98 Am. Dec. 367; *Tewhy v. Wingfield*, 52 Cal. 319; *Wentworth v. Miller*, 53 Cal. 9; *Howell v. Foster*, 65 Cal. 169, 3 Pac. 649; *Esdon v. Colburn*, 28 Vt. 631, 67 Am. Dec. 730.

The supplemental answer was properly stricken out by the court, for the reason that it stated no facts not known to the defendants at the time of the filing of the original answer. The allegations in the supplemental answer contradictory of the allegations in the original were properly stricken out. *Slauson v. Englehart*, 34 Barb. 198; *Buchanan v. Comstock*, 57 Barb. 582.

The right to allow amendments to any pleading is a matter of discretion with the trial judge, and no error lies from the decision, unless it clearly appears to be an abuse of discretion.

It is assigned as error that the court below allowed the plaintiff to show the value of the property in question at the time of the trial. The correct rule was applied. *Colby on Replevin*, sec. 941; *Romaine v. Vanallen*, 26 N. Y. 309; *Munsgrave v. Beckendorff*, 53 Pa. St. 310; *Hammer v. Hathaway*, 33 Cal. 117.

The appellants, being wrong-doers, no deduction should be allowed for labor bestowed upon the property. *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307, and note; *Snyder v. Vaux*, 2 Rawle, 433; *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505, 24 Am. Dec. 66, and note; *Final v. Backus*, 18 Mich. 218; *Nesbit v. St. Paul Lumber Co.*, 21 Minn. 491; *Bly v. United States*, 4 Dill. C. C. 464, Fed. Cas. No. 1581; *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Davis v. Early*, 13 Ill. 193; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Gates v. Rifle Boom Co.*, 70 Mich. 309, 38 N. W. 245; *Busch v. Fisher*, 89 Mich. 192, 50 N. W. 788.

SLOAN, J.—On December 4th, William H. Robinson entered into a written contract with John W. Thomas and D. C. Clarahan, the terms of which contract were substantially as follows: Robinson agreed to furnish land, water for the irrigation thereof, and seed for the growing of crops of barley and wheat thereon during the season of 1890. Thomas and Clarahan agreed to construct the necessary irrigating ditches on said land, to sow, irrigate, and otherwise tend and care for said crops of barley and wheat until maturity, and then at the proper season to harvest thresh, clean, and sack all the grain produced by said crops, entirely at their own expense. The contract, in addition, contained the following stipulation: “That the title to said entire crops shall always be and remain in the party of the first part until the same shall have been grown, harvested, and sacked, and 150 pounds of wheat for each and every acre of land sown in wheat, and 200 pounds of barley for each and every acre of land sown in barley, and hauled by the parties of the second part at their own expense, and they hereby agree to haul the same to the city of Phoenix, Arizona, and there deposit the same in some place to be designated by the party of the first part; and that thereupon, and not before, the remaining portion of said grain so grown and harvested on and from said land shall be paid to said second parties for the things they undertook to do in the premises, provided they shall perform the same in good faith; and that during all the period of time herein specified said first party shall be deemed in possession of said lands and crops, and all said work shall be done under his supervision and to his satisfaction; and, in the event of a failure on the part of the second parties to diligently prosecute the said work, the party of the first part may perform the same himself, and carry out the terms of the foregoing agreement in any manner he shall see fit, and all rights of the second parties shall thereupon cease and determine.” It was further stipulated that the party of the first part should not have the right “to be dissatisfied with said work, or perform the same himself, or to interfere with the second parties, if the second parties prosecute their work with ordinary diligence, and perform the same in a diligent and workmanlike manner.”

It appears that Thomas, under said contract, entered upon the land of Robinson, and performed the labor required in

the growing of said crops, and, when the latter had matured, cut and stacked the same on said land. It further appears that on August 7, 1890, appellant Gray, as sheriff, seized said stacks of wheat and barley under an execution issued out of the district court of Maricopa County under and by virtue of a judgment rendered therein in favor of appellant Tantau and against said Thomas. After the levy of said execution said sheriff, Gray, had the grain threshed, sacked, and hauled and stored in the city of Phoenix, paying for this labor out of said grain at the then market price thereof in Phoenix. On or about August 30th, appellee, Robinson, learning that the grain was in the possession of the sheriff, notified him as well as the judgment creditor, Tantau, of his ownership under his contract with Thomas, and, being refused possession of the same, on the 5th of September, 1890, brought suit in claim and delivery against said sheriff, Gray, and said judgment creditor, Tantau, setting up in his complaint that he was the owner and entitled to the possession of the whole of said grain, and praying for the return thereof, or its value, as well as damages for the taking and detention. Robinson, having given bond for the possession of the grain as required by the statute, and obtained an order for the delivery, took possession of the grain remaining in the hands of the sheriff, after paying for the threshing, sacking, and hauling, as aforesaid. Appellants answered the complaint—First, by general denial; and second, by alleging ownership and possession in Thomas, and justifying the seizure by the sheriff by virtue of the execution issued under said judgment against said Thomas. The case was tried by the court without the aid of a jury. After the cause had been submitted and taken under advisement, appellants filed a supplemental answer and cross-complaint, in which they attempted to set up Thomas's interest in the grain under the contract with Robinson, and asked that he be made a party to the end that his rights be determined and appellant Tantau be subrogated thereto. This supplemental answer was stricken out by the court upon motion, whereupon judgment was entered in favor of Robinson for the possession of the whole of the grain returned to him under the order of delivery, and for the sum of \$525.32 damages found to have been sustained to the same, and also judgment for the return of the remainder of the grain, or its value, assessed at the sum

of \$682.93, and for costs of suit. A motion for new trial was made and overruled, whereupon this appeal was taken.

The principal contention in this case grows out of the interpretation to be put upon the contract between Robinson and Thomas. Appellants contend that it is nothing more than a contract of lease, and that by it the relation of landlord and tenant was created between the parties thereto; that all the interest which Robinson had, therefore, in the crops was a mere lien for the share he would have been entitled to had the contract been fully and completely carried out by the parties thereto. On the other hand, it is contended by the appellee that it is a contract of hire, or what is commonly denominated a "cropper's contract," which may be defined generally as one in which one agrees to work the land of another for a share of the crop, without obtaining any interest in the land or ownership in the crop before division. Under such a contract the occupier becomes merely the servant of the owner of the land, being paid for his labor in a share of the crop. The authorities are somewhat conflicting as to what words will constitute a contract one of lease and what will constitute one of hire. The general rule, as laid down by the weight of authority, is, that the character of a contract to cultivate lands on shares is to be determined by ascertaining the intention of the parties as expressed in the language they have used. If the language used imports a present demise of any character by which any interest in the land passes to the occupier, or by which he obtains the right of exclusive possession, the contract becomes one of lease, and the relation of landlord and tenant is created. *Putnam v. Wise*, 37 Am. Dec. 314, and cases therein cited. If, on the other hand, there be no language in the contract importing a conveyance of any interest in the land, but by the express terms of the contract the general possession of the land is reserved by the owner, the occupant becomes a mere cropper, and the relation of master and servant exists between him and the owner. *Haywood v. Rogers*, 73 N. C. 320; *Adams v. McKesson*, 53 Pa. St. 81, 91 Am. Dec. 183; *Esdon v. Colburn*, 28 Vt. 631, 67 Am. Dec. 730; *Wentworth v. Miller*, 53 Cal. 9; *Romero v. Dalton*, 2 Ariz. 210, 11 Pac. 863. The contract in question provides in express terms that the title to the crops to be grown was to be vested in Robinson, and that he was to be deemed to be

in the exclusive possession of the whole thereof until a division should be made, as therein provided. No words of demise are contained in any clause, and all words which might by any possibility be so construed are evidently purposely omitted. In the case of *Romero v. Dalton*, cited above, this court declared an agreement similar in terms to the one in question to be a cropper's contract, and that the relation of landlord and tenant was not created thereby. We are clearly of the opinion that the contract between Robinson and Thomas must be so regarded. If the title and possession of the whole of the grain were in Robinson until division, Thomas had no such interest in the grain as rendered it liable to execution for his debt so long as it remained *en masse*. *Chandler v. Thurston*, 10 Pick. 205; *Warner v. Hoisington*, 42 Vt. 94; *Brazier v. Ansley*, 11 Ired. 12, 51 Am. Dec. 408. The whole of the grain being the property of Robinson at the time of its seizure by the sheriff, he was entitled to recover its possession in the present action. He would have been so entitled, as against Thomas, had the latter undertaken to dispose of the same in any other way than as provided in the contract. Thomas being the mere servant of Robinson, and having no leviable interest in the grain, appellants were therefore strangers to the contract, and had no right to be substituted in the place of Thomas in carrying out the provisions of the contract. Nor had they the right, as claimed by them, to compel in this action a determination of any claim Thomas may have against Robinson growing out of said contract. The action of claim and delivery is primarily one for delivery of possession of property to the one rightfully entitled thereto, and, as we have decided this right to be in Robinson at the time of suit, appellants could not withhold the possession of the grain from him under a claim that they were entitled to an accounting from Robinson for what might be due Thomas. If they, as the creditors of Thomas, have a right to compel such an accounting, it is not to be enforced in this action. The views we have expressed dispose of the question as to the correctness of the court's ruling in striking out the supplemental answer and cross-complaint.

Appellants complain that the trial court assessed the value of the property at the time of the trial, and not at the time of taking. We find no error in the ruling of the court in this

respect. Whatever may be the rule in the ordinary action of replevin, under statutes similar to our own, which provide for an alternative judgment for the return of the property or payment of its value, the rule generally applied is to assess the value of the property at the time of trial. *Brewster v. Silliman*, 38 N. Y. 423; *Pope v. Jenkins*, 30 Mo. 528; *Lambert v. McFarland*, 2 Nev. 58; *Carson v. Applegarth*, 6 Nev. 187.

The court below refused to hear proof of the cost of threshing and hauling the grain, expended by the sheriff, and made no deduction thereof in the judgment. This is assigned as error by the appellants, who contend that they should have been allowed this cost, for the reason that it was spent in bettering the property, in ignorance of the claim of appellee. While there are authorities which hold that when the taking was in good faith the plaintiff in replevin can only recover the value of the property less the increased value put upon it by the labor and skill of the innocent taker, the weight of authority seems to be that in actions of claim and delivery, as also in replevin, where the legal identity of the property has not been destroyed, the owner is entitled to recover the whole of it or its full value without any deduction for labor bestowed upon it. In trover, undoubtedly, a different rule prevails. The present case is scarcely one for the application of the rule contended for, in any event. It was the business of the sheriff, under the writ, to have levied upon and sold the property in the stack, and he was scarcely justified in expending labor or cost upon it which was not necessary for its preservation. We think the judgment should be affirmed, and it is so ordered.

[Civil No. 362. Filed January 25, 1893.]

[33 Pac. 418.]

THE WATERVALE MINING COMPANY OF CHICAGO,
Plaintiff and Appellant, v. C. W. LEACH et al., De-
fendants and Appellees.

1. MINES AND MINING — LOCATIONS — EXTRALATERAL RIGHTS — REV. STATS. U. S. 1878, SECS. 2319, 2322, CITED.—Sections 2319 and 2322, *supra*, give all lodes, veins, and ledges, throughout their en-

tire depth, the tops or apexes of which lie inside of the surface lines of the claim extended downward vertically; and as lodes may dip and extend beyond the boundaries of the claim, they may be followed, but the locator shall be entitled only to such part thereof as lies between vertical planes drawn downward through the end-lines of the claim.

2. **SAME—EXTRALATERAL RIGHTS.**—A locator may in two instances pursue a lode beyond the limits of his claim: First, when the lode, having the apex within the boundaries of his claim, shall dip beyond them; and second, when he shall have located a lode prior to the tenth day of May, 1872, under the mining laws then in force, and shall, as against a subsequent and overlapping claim, have saved his right to his lode in the manner prescribed in the act of 1872. In the latter case the prior locator may follow his lode, upon its strike or dip, into other ground than his own.
3. **SAME—CROSS-LODES—REV. STATS. U. S. 1878, SEC. 2336, CITED.**—Section 2336, *supra*, provides that, at the space of intersection of lodes crossing, the oldest locator shall have the ore, and the junior locator shall have a right of way through the space to pursue and work his lode; that if there be a union of two lodes, the senior locator shall take the ore at the space of intersection or union, and all of the lode below the point of union.
4. **SAME—LOCATION—CROSS-LOCATIONS—LENGTH OF CLAIM—SIDE-LINES TREATED AS END-LINES.**—It is not essential to the validity of a mining claim that it be located along the course of the lode. The statute provides that the extreme extent along the lode shall not exceed fifteen hundred feet. It may be less. If the side-lines, instead of the end-lines, cross the course of the lode, in order to define the locator's rights to pursue the lode on its dip, the side-lines will be treated as the end-lines.
5. **SAME—REV. STATS. U. S. 1878, SEC. 2336, CONSTRUED.**—The expression, the "ore within the space of intersection," used in section 2336, *supra*, means that body of ore bounded by the foot- and hanging-walls of one lode, extended in a general course of that lode, and the foot- and hanging-walls of the intersecting lode, extended upon its general course. It is only to this body of ore that section 2336 relates.
6. **SAME—EXTRALATERAL RIGHTS—NO RIGHT TO GO OUTSIDE ON STRIKE OR COURSE, EXCEPT ON LOCATIONS PRIOR TO 1872—REV. STATS. U. S. 1878, SEC. 2322, CITED.**—By section 2322, *supra*, a locator cannot go outside of any of his lines on the strike or course of any lode, except under rights acquired by him prior to the enactment of 1872, and saved to him under the provisions of that act.
7. **STATUTORY CONSTRUCTION — CONFLICTS — WHEN OPERATE TO REPEAL.**—The canon of statutory construction that as between conflicting sections of the same statute the last in the order of arrangement

shall prevail is applicable only where no reasonable construction will harmonize the parts.

8. MINES AND MINING—REV. STATS. U. S. 1878, SECS. 2322, 2336, IN HARMONY—SECTION 2336 CONSTRUED.—Sections 2322 and 2336, *supra*, are in complete harmony. Section 2336 gives no new rights beyond those granted by section 2322, but defines and settles prior existing rights at the space of intersection.

9. SAME—CROSS-LODES—DIP—STRIKE—REV. STATS. U. S. 1878, SEC. 2336, CONSTRUED.—Section 2336, *supra*, defines the rights of locators in the space of intersection of lodes crossing or uniting on the dip, and has no reference to crossing of lodes on the strike.

DISMISSED ON MOTION OF APPELLANTS.—*Leach v. Watervale Mining Co.*, 159 U. S. 258, 40 L. Ed. 147, 15 Sup. Ct. Rep. 1040.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

W. H. Stilwell, for Appellant.

From a careful reading of section 2336 of the Revised Statutes of the United States, it clearly appears that it refers *only* to the crossing of *two or more veins with each other*. Not even the crossing of *leads or lodes* with each other (unless they are “veins”), or the crossing of *leads or lodes* with *veins*; or the crossing of either a *lead, lode, or vein*, with the lateral course of a surface location of a mining claim, or with the *side-lines* of a surface location or the crossing of one surface location by another surface location, but simply and only “when *two or more veins intersect or cross each other*.” There is nothing ambiguous in the language used, and it cannot be applied to anything but two *veins*.

While we do not agree with the learned court of Colorado in its application of section 2336 of the Revised Statutes of the United States to veins crossing each other on their strike or course, instead of to veins crossing each other on their dip, we do, however, agree with the learned court to this extent, that section 2336 applies only where two or more veins actually intersect or cross each other in some manner—either on the strike or the dip; that there must be an actual crossing of two veins; that section 2336 cannot apply where there

is but one vein. There cannot be an actual crossing of two veins in mining premises, unless two veins exist there. Under the pleadings the question of a crossing of two veins is not in issue.

Defendants' separate defense alleges that the Little Comet vein "has not intersected or crossed any other lode or vein," and defendants' three-hundred-foot level or drift is nearly two thousand feet long, from the "Miner's Dream" north, and more than half-way across the Black Eagle location, and not a word of testimony from which a crossing of mineral bodies can be presumed or inferred.

When defendants crossed the boundary-line of plaintiff's location, they were *prima facie* trespassers, and the burden of proving the contrary devolved upon them. *Cheeseman v. Shreve*, (Justice Brewer) 37 Fed. 36.

As to the necessity of defendants showing an actual crossing of two veins, as distinguished from a case with but a single vein, the court of Colorado in the case of *Omar v. Soper*, 11 Colo. 389, 7 Am. St. Rep. 246, 18 Pac. 445, says:—

"The attempt to justify the steps taken by the Verde claimants for the acquisition of title to the Golden Bell, by reference to the statutes relating to location of cross-lodes, is equally abortive. It is illogical; there being no analogy between the two classes of location, nor in the statute relating thereto. In the present case, there is a single vein; and under a fair construction of the statutes, federal and state, the portion thereof appropriated by the first discoverer is wholly withdrawn from interference or claim by any other citizen until some default is made. Such is not the law with reference to cross-lodes. In such case there are two lodes, which either cross each other or, approaching from different directions, unite at some point. In such cases the act of Congress (Rev. Stats., 2336) authorized the subsequent locator to cross or enter upon the territory of the claimant of the other lode. In this class of cases (cross-lodes) a claim to a portion of the previously appropriated territory may be initiated by authority of law, while it remains a valid subsisting claim; but no such authority exists as to the former class" (single vein).

In Copp's United States Mineral Lands (p. 470) a cross-vein is defined to be an "intersecting vein." Referring to

section 2336, it says, in speaking of rights under a patent to a mining claim, "Provided, however, that where another lode crosses, the ore at the space of intersection of the two lodes belongs to the party who owns the prior location of the two, whether patented first or second."

In *Morgenson v. Middlesex M. and M. Co.*, 11 Colo. 177, 17 Pac. 513, the defense was based upon the allegations that the Silver Bell lode or vein, crossed the Butler lode or vein. There were two distinct veins.

In *Coffee v. Emigh*, 15 Colo. 188, 25 Pac. 85, the court says: "It is conceded that the territory of the Emancipation lode crosses the territory of the Western Slope lode almost at right angles, and that the veins therein are cross-veins."

In the Eureka case, 4 Saw. 324, Fed. Cas. No. 4548, Judge Field, speaking of the rights conferred on the locator of a mining claim under the act of 1872, says: "But these additional rights are granted subject to the limitation that in following the veins, lodes, or ledges, the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end-lines of his location, and a further limitation upon his rights in cases where two or more veins intersect or cross each other."

To the same effect, that there must be an actual crossing of two veins, is section 185 of Weeks on Mineral Lands, p. 247.

There is no conflict in the authorities that section 2336 of the Revised Statutes of the United States can only be applied to two veins actually crossing each other in some form or manner.

This being the case, and defendants' answer alleging that the vein in question is not crossed by and does not cross any other vein in plaintiff's premises, when the court found that the plaintiff was entitled to the surface ground of the Black Eagle location, it determined all the material facts in the case, and plaintiff should have had judgment as prayed for. There being no crossing of two veins in the case, there is nothing, even under the Colorado decisions, on which to base a judgment for defendants. The portion of the judgment in their favor is contrary to both the law and defendants' answer. The question of crossing or intersecting of two veins is pleaded out of the case, under any construction of section

2336, and, like the Verde claimants in *Omar v. Soper*, 11 Colo. 389, 7 Am. St. Rep. 246, 18 Pac. 445, defendants attempt to justify the steps taken by them "for the acquisition of plaintiff's vein by reference to section 2336 is equally abortive. It is illogical." The pleadings must be strictly construed against the party pleading. *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725; *Bensley v. Mountain Lake W. Co.*, 13 Cal. 316, 73 Am. Dec. 575; *Charter v. San Francisco Sugar Ref. Co.*, 19 Cal. 257; *De Castro v. Clark*, 19 Cal. 16; *Garwood v. Hastings*, 38 Cal. 216.

The real foundation of the right they claim does not exist. And the court is asked to find a constructive vein, based on the imagination of counsel, and against his pleading and his testimony. If there was a crossing of veins in this case, it devolved upon defendants to allege and prove it, instead of alleging and proving the contrary. *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436.

Their claims and pleading must not be contradictory. After they denied and disproved any crossing of veins, they asked, and the court found, a constructive crossing of a real vein with the "court's vein." Where will the "court's vein" intersect the quartz vein? What is the width, strike, and dip of the "court's vein"? What amount of ore at space of intersection would plaintiff be allowed? Will not defendants claim the apex of the "court's vein" as the original discoverers?

"A finding of fact which negatives the existence of a fact admitted by the pleadings is a finding against the evidence, and judgment rendered thereon is erroneous." *Silverton v. Neary*, 59 Cal. 97.

In determining the question what is a cross-vein, or what sort of crossing of two veins Congress had in mind when the act known as the act of May 10, 1872, was passed, it is necessary to consider—

First—The authority to make a mining location and where it is found. Under the act of 1872 there is no authority for locating a lead, lode, or vein of ore except by locating the surface ground, including the top or apex of the lead, lode, or vein. Rev. Stats. U. S., sec. 2319. The surface so located is a mining claim upon veins or lodes of quartz or other rock in place. Rev. Stats. U. S., sec. 2320.

The miner locates the lead, lode, or vein only by locating the surface ground, including the apex of the lead, lode, or vein. *Eilers v. Boatman* 3 Utah, 167; *Gleeson v. Martin White Mining Co.*, 13 Nev. 457.

The "location," or the "claim," may be fifteen hundred feet by three hundred feet on each side of the vein or lode, and it is prohibited that mining regulations shall limit a claim so located to less than twenty-five feet on each side of the vein. Hence we see that the mining location authorized by the act of 1872 is the surface ground, and with the surface ground, marked with well-defined boundaries, is acquired the right to "all leads, lodes, or veins the tops or apexes of which are within said boundaries extended down vertically." *Belk v. Meagher*, 104 U. S. 280; *Gleeson v. Martin White Mining Co.*, 13 Nev. 457.

Section 2324 provides, among other things, that the location must be marked distinctly on the ground, so that its boundaries can be distinctly traced. The "claim located" must be described by reference to such natural objects or permanent monuments as will identify the claim.

Section 2325 of the Revised Statutes of the United States provides that "A patent for *any land claimed and located* for valuable deposits, may be obtained," etc. The field-notes of the surveyor shall show "accurately the boundaries of the claim," which shall be distinctly marked by monuments on the ground.

Therefore, a mining location is a location of surface ground containing mineral discovered, and the mineral can only be located by locating the surface containing it. The location and claim is a surface location and surface claim, the boundaries to which must be fixed and monumented on the ground as provided by law.

When this is done, section 2322 grants to the locators of such surface locations "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes, and ledges throughout their entire depths, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their 'course downward' as to extend outside the vertical side-lines of such surface locations. . . . And nothing in this

section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Rev. Stats. U. S., sec. 2322; *Gleeson v. Martin White Mining Co.*, 13 Nev. 457; *Blake v. Butte S. M. Co.*, 2 Utah 57; *The Eureka Case*, 4 Saw. 323, 324, Fed. Cas. No. 4548; *Eclipse etc. Mining Co. v. Spring*, 59 Cal. 304.

Section 2322 is clear and unambiguous. *Iron Silver Mining Co. v. Elgin Mining etc. Co.*, 118 U. S. 206, 6 Sup. Ct. Rep. 1177.

One of the earliest locations under the act of 1872 is decided in the case of *Gleeson v. Martin White Mining Co.*, 13 Nev. 454. At page 456, the court says: "It is true that the vein is the principal thing, and that the surface is but an incident thereto, but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings, or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim, but the location is of a piece of land including the vein." See *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 329.

Again, in *Gleeson v. Martin White Mining Co.*, 13 Nev. 457, speaking of section 2320 of the Revised Statutes of the United States: "This section alone shows that it is a surface parallelogram not less than fifty feet in width that must be located, etc., as to the exclusive right of possession of all of surface included within the lines of their locations and of all veins." Rev. Stats. U. S., sec. 2322. "This is the only part of the act which grants the right to possess any lode, ledge, or vein."

If section 2322 is the only part of the act which grants the right to possess any ledge, lode, or vein, then no location can be made under section 2336, which simply refers to intersecting veins having apexes in adjoining claims, and having no conflict as to surface, and section 2336 must then be intended to determine some right separate from the surface claim, and which arises when the vein is followed on its downward course into the earth.

Section 2336 seems to contemplate that the point or space of intersection of "two or more veins" can be reached without any conflict or controversy between the locators of such veins, because it provides for nothing else than the determi-

nation of the rights of the respective parties at the *point* or *space* of intersection as to the ore or mineral contained therein and the right of way through such veins. This section appears to be limited to such point.

It is certain that such point or space of intersection of two or more veins will be under the surface of either the senior or junior location. If this is the case, what authority exists in the Mining Act of 1872 for the locator or owner of any mining claim to pass from beneath his own surface ground and under the surface of an adjoining mining claim. The only authority is found in section 2322 of the Revised Statutes of the United States, and then only *to follow a vein or lode on its dip*. Again, on page 458, 13 Nev.: "Thus it appears that a location of a vein must be made by taking up a piece of land to include it. No other means are provided, etc. No other view can be taken where the language of the law is so plain as it is in this instance." Again, on page 460: "Unless the miners voluntarily restrict themselves by local regulations, a claim may always be one thousand five hundred feet long and six hundred feet wide. Let the discoverer be ever so unfortunate in locating his claim, he cannot possibly get less than six hundred feet of the vein, while under the old law the most he could get was four hundred feet." Again, at page 461: "Before the statute [1872] he [the locator] could claim no more than four hundred feet of the vein, and of that he was not secure for a day. The moment he developed rich ore he was beset by trespassers, and, in order to enjoin them from stealing his property, was obliged to trace the vein between them and the discovery point. He was harassed with litigation, and his means often entirely consumed in the prosecution of work not necessary for the development of his mine but essential for the vindication of his title. . . . Under the new law this source of vexation and expense is entirely swept away. Within his surface-lines the discoverer of a vein is secure. . . . Sound policy, therefore, concurs with the language of the statute in sustaining our conclusion that a vein can only be located by means of a surface claim."

The foregoing decision fully explains the instructions of Judge Hallett in *Zollars v. Evans*, 5 Fed. 172, 2 McCrary 39, 4 Morr. Min. Rep. 402, and the Colorado court, in *Wolfly v. Lebanon Mining Co.*, 4 Colo. 112, requiring plaintiff to

trace the mineral in the discovery shaft to the ground in controversy. It was under the act of 1866, when only a lode, and only one lode, could be located,—all else was open to location by others. Hence the necessity of connecting the discovery shaft by mineral with the premises in controversy. The act of 1872 did away with this. Within his surface-lines the owner of a valid location is secure.

The principle laid down by the supreme court of the United States in case of *Mining Co. v. Tarbet*, 98 U. S. 467-468, must control, to wit: As to this ledge or vein, the rule applying to the end-lines of a location must be applied to our side-lines, which cross the vein in question at right angles; or, in other words, our side-lines become our end-lines, and our right to follow the vein on its “downward course” shall be limited on the strike of such vein by such vertical planes. *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 206-208, 6 Sup. Ct. Rep. 1177; *Argentine Mining Co. v. Terrible Mining Co.*, 122 U. S. 478-484, 7 Sup. Ct. Rep. 1356.

Defendants claim that this case falls under section 2336 of the Revised Statutes of the United States. They rely on the cases of *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669; *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77.

We have seen from these cases, on their own interpretation of what a crossing consists, that section 2336 applies only “when two or more veins intersect or cross each other,” and not when a vein crosses a location or claim, or a gulch or something else. Defendants admit in their answer that the vein claimed by them simply crosses the Black Eagle claim or location, and that it does not cross or intersect any other vein or ledge within the Black Eagle premises; and on these facts the decisions of the United States supreme court are conclusive. *Mining Co. v. Tarbet*, 98 U. S. 463; *Eilers v. Boatman*, 3 Utah 167; *Iron Silver Mining Co. v. Elgin Silver Mining Co.*, 118 U. S. 206, 6 Sup. Ct. Rep. 1177; *Argentine Mining Co. v. Terrible Mining Co.*, 122 U. S. 478-484, 7 Sup. Ct. Rep. 1356.

What sort of crossing of two veins did Congress intend?

If the vein claimed by the defendants crossed another vein on its strike or course within the vertical boundary-lines of the Black Eagle mining claim, section 2336 would not apply (as was held by the supreme court of Colorado, in the case of

Branagan v. Dulaney), for the reason that under section 2322 of the Revised Statutes of the United States plaintiff, having a prior valid location, is entitled to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically," etc.

If plaintiff had an east-and-west ledge or vein extending through its premises, and the vein claimed by defendants cut or crossed it on its strike or course, defendants could not follow the vein claimed by them across plaintiff's side-lines, for the apex of such vein would then be within plaintiff's vertical boundary-lines, and under section 2322 would belong to plaintiff. *Belk v. Meagher*, 104 U. S. 280; *Gleeson v. Martin White Mining Co.*, 13 Nev. 457; *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 329; *Iron Silver Mining Co. v. Elgin Silver Mining Co.*, 118 U. S. 206, 6 Sup. Ct. Rep. 1177; *Jupiter Mining Co. v. Bodie Con. Co.*, 11 Fed. 676. The supreme court of Colorado, in the case of *Branagan v. Dulaney*, does not appear to have made any distinction between a case where "two or more intersect or cross each other" on their strike or course and a case "where two or more veins intersect or cross each other" on their "dip." The learned court says in that case regarding section 2322 and 2336: "The two sections appear to have been carelessly drafted, for they are certainly, to some extent, in conflict with each other." The court admits that to allow a subsequent location of any vein, the apex of which is within the vertical boundary-lines of a prior location, seems to be in conflict with a literal interpretation of section 2322, which Justice Field says "appears sufficiently clear on its face." The learned Colorado court further says: "But if such [the right to locate a vein crossing another on its strike] was the intention, we see no way out of the dilemma, except by the application of the arbitrary rule of construction. . . . As between conflicting statutes, the later in date will prevail, and as between conflicting sections of the same statute, the last in order of arrangement will control."

Thus the learned court gets out of a "dilemma" by practically repealing so much of the plain, unambiguous section 2322 as grants to the locators of mining claims "all other veins, lodes, or ledges throughout their entire depth, the apex of which lies inside of such surface-lines extended downward

vertically," providing such other vein or ledge crosses on its strike or course, any vein, or ledge, at any angle within the boundary-line of a prior location.

The only apology necessary for such conclusion is given in the language of the court,—“We see no other way out of the ‘dilemma’ except,” etc.

That this was so is not surprising when, from the argument of counsel, it does not appear that the attention of the Colorado supreme court was called to the fact that “two or more veins” could “intersect or cross each other” on their dip, and not touch, intersect, or cross on their strike or course, and that it was to such sort of veins, crossing or intersecting in such manner only, that section 2336 was intended to apply, and that it does so apply to such sort of veins, without conflicting in any respect “with a literal” interpretation of section 2322.

To illustrate, let the following figures (page 46) represent two mining locations or veins running in opposite directions. If such locations could be permitted, as it is held in the Brangan case, it is plain that the older locator could not have all other veins, lodes, and ledges the top or apex of which lies within his surface location, because the apex of the cross-vein from A to B is inside the boundary-lines of the senior location, which is represented by the white surfaces respectively.

With such a construction of the statute, no mining claim, whether patented or not, would be free from the liability of the ruinous expense and delay of litigation caused by “mine-jumpers,” cross-locators, and blackmailers. A mining claim could never be free from the dangerous possibility of “cross-location.” *Gleeson v. Martin White Mining Co.*, 13 Nev. 442; *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 329.

The price of extricating the learned court of Colorado from the “dilemma” is the casting of the titles of all mining premises into a much worse “dilemma” and changing a clear, simple mining act into an ambiguous and conflicting statute.

Apply section 2336 to another sort of veins, well known when the Mineral Act of 1872 was passed,—veins which cross or intersect each other, or unite,—not on their strike, but on their dip,—to veins which have parallel apexes, strike in the same direction, and, when developed or followed on their “downward” course, are found to “dip” in opposite direc-

tions (toward each other), and to intersect and cross each other, or to unite (possibly several hundred feet below the surface of the claim), as shown in the following figures I and II (page 47), and to which all the provisions of section 2336

X

clearly apply, and in no respect conflict with the provisions of section 2322. As to two veins meeting at a five-hundred-foot level and forming one vein, under section 2336, see *Champion*

FIG. I

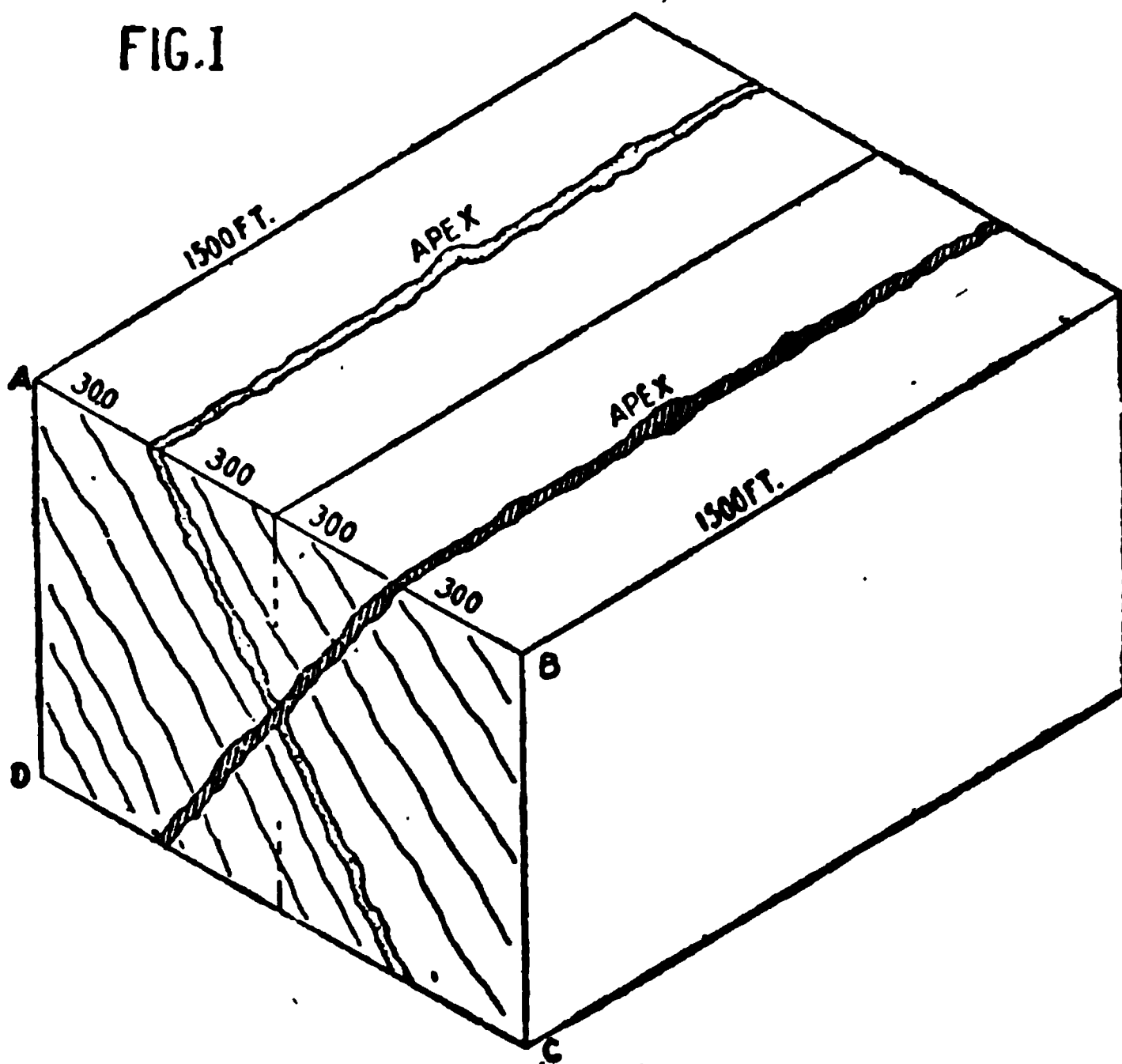
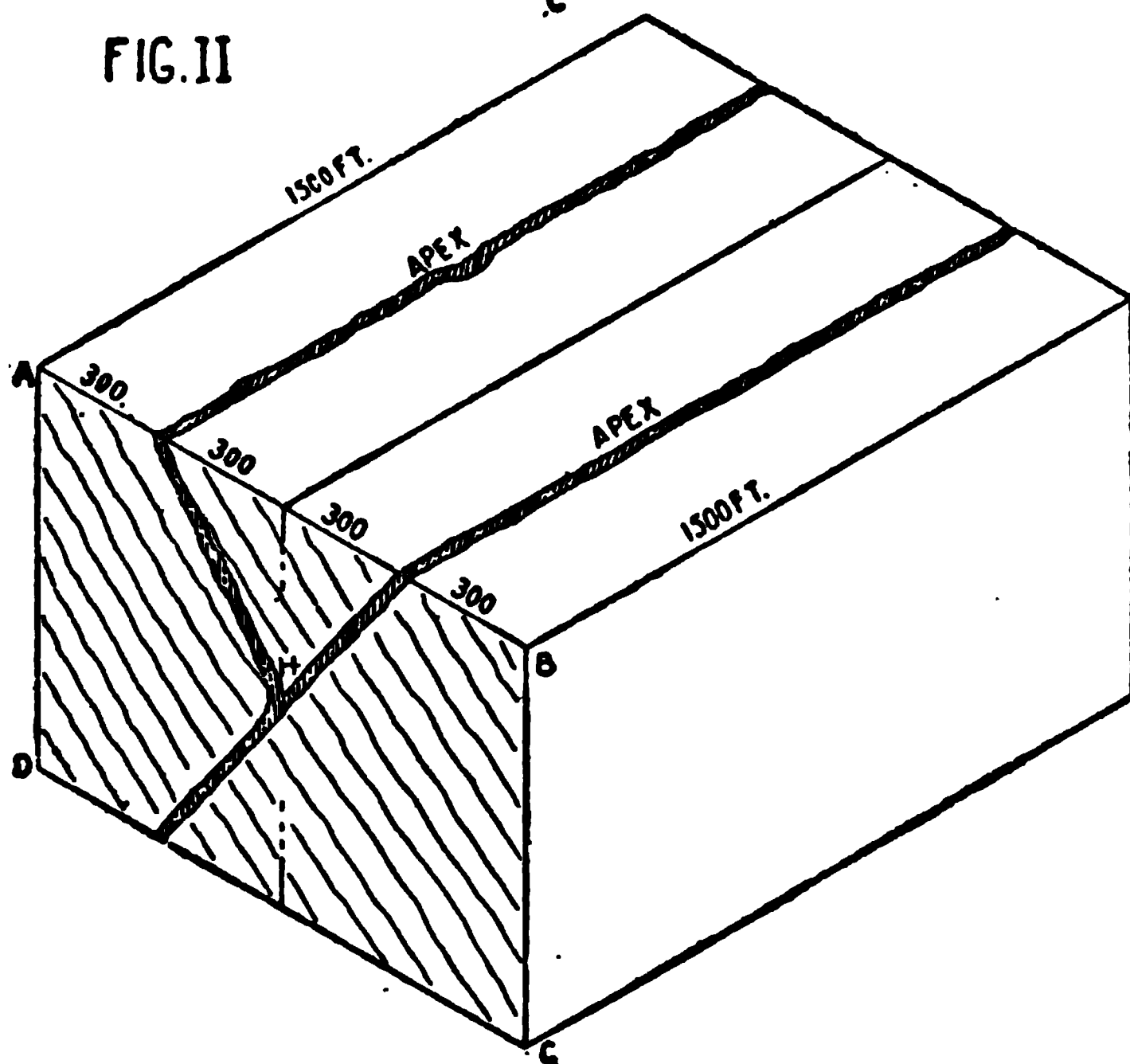


FIG. II



Mining Co. v. Consolidated Mining etc. Co., 75 Cal. 78, 16 Pac. 513; *Jupiter Mining Co. v. Bodie Con. Mining Co.*, 4 Morr. Min. Rep. 411, 11 Fed. 666, 7 Saw. 96.

A, B, C, D is a perpendicular plane through the end-line of the claim into the earth, showing the dip of the veins in figure I, until they "intersect and cross" on their "downward course" and in figure II until they "unite" on their "downward course."

From these figures it will be noticed that the croppings or apexes of the veins are parallel, that there is no conflict of locations or surface rights. Each locator is entitled to the "exclusive right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines."

When we apply section 2336 to "two or more veins" that "intersect or cross each other" on their dip only (as shown in figure I), and also to "two or more veins" that "unite" on their dip only (as shown in figure II), we see that in a literal construction of sections 2322 and 2336 there is no conflict between them.

There is no "dilemma" requiring "the application of an arbitrary rule of construction."

Each section "appears sufficiently clear on its face. There is no patent or latent ambiguity in it."

In applying section 2336 to figure I, we observe how clear is the language of the statute: "Priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection [I]; but the subsequent location shall have the right of way through the space of intersection [I] for the purpose of the convenient working of the mine; and when two or more veins unite [as in figure II at point H], the oldest or prior location shall take the vein below the point of union [H], including all the points of intersection."

We notice that the right of way is very necessary in following a vein on its dip when it crosses another vein, or is crossed by another vein on its dip. Without this privilege it would be impossible for the junior location to follow the vein below the point of intersection or crossing.

This construction is the plain common-sense construction,

and makes both sections in question perfectly harmonious, and acquits and relieves the "framers of these sections" of the "high charge" of the learned court of Colorado, of using words to "disguise" instead of to express "their meaning."

"It is always better," says Judge Sharswood, "to adhere to a plain common-sense interpretation of a statute." *Gyger's Estate*, 65 Pa. St. 312.

It is sustained by consideration of the necessity of its provisions when applied to veins crossing or intersecting each other on their dip only.

Besides, no other construction is consistent with the Mining Act as a whole, and it is a familiar rule in the construction of statutes that they must be so construed as to admit all parts of them to stand, if possible. 1 Bouvier's Institutes, p. 42, sec. 7; *Heydenfeldt v. Daney Gold etc. Co.*, 93 U. S. 638; *Cope v. Cope*, 137 U. S. 686, 11 Sup. Ct. Rep. 222; *McCool v. Smith*, 1 Black, 459; *Brown v. Lease*, 5 Hill, 221; *Ex parte Yerger*, 8 Wall. 105; *United States v. 67 Packages*, 17 How. 85; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434; *Henderson's Tobacco*, 11 Wall. 652; *Venable v. Richards*, 105 U. S. 638; *Ex parte Crow Dog*, 109 U. S. 570, 3 Sup. Ct. Rep. 396; *Chew Hong v. United States*, 112 U. S. 549, 5 Sup. Ct. Rep. 255.

In the history of mining there does not appear to have been any litigation over veins which either cross or intersect each other on the "downward course" or dip, or veins which intersect and unite on their dip or downward course, excepting the case of *Champion Mining Co. v. Consolidated etc. Mining Co.*, 75 Cal. 78, 16 Pac. 513, and the instructions of Judge Sawyer in the case of *Jupiter Mining Co. v. Bodie Con. Mining Co.*, 4 Morr. Min. Rep. 411, 11 Fed. 766, 7 Sawy. 96. To this sort of formation section 2336 applies so plainly and clearly there could not well be any excuse for a controversy.

Under the law of 1872, the locator is secure within his surface-lines, and does not have to trace his point of discovery by mineral to the point of the jumper, cross-locator, or the secret miner on the three-hundred-foot level.

If this were not so, how could the Mining Act be applied to this mining district, containing, as shown by the evidence, a few large fissures, and the intermediate and adjacent country, consisting of lime rock, embracing all sorts of irregu-

lar forms of ore deposits, chambers, pockets, connected or disconnected by crevices, seams, stringers of ore, or stained rock, feeders, offshoots, or spurs? Shall the law be construed, unnecessarily, so as to require a locator of a mine to show a ledge from one end of his location to the other, before he can eject a trespasser from the ground he has located? If so, how is the prospector to acquire exclusive right of possession to mineral in a limestone formation containing irregular and disconnected deposits or ledges of ore?

The effect of a location like the Black Eagle claim is fully determined by the decision of the United States supreme court in *Mining Co. v. Tarbet*, 98 U. S. 467.

William Herring, for Appellees.

The plaintiff is bound by the lines of its surface claim in favor of the subsequent locator.

In the Golden Fleece case, 15 Nev. 450, the testimony showed that "When the Golden Fleece was originally located the vein was supposed to run northwest and southeast, and that the surface claim was so marked out on the ground; that subsequently, and long after the Leonard claim had been located, according to its present boundaries, and even after the official survey made for the purpose of the application for a patent, the plaintiff, discovering that the vein ran northeast and southwest, swung its claim around almost at right angles to its former position," etc.

In view of this attempted swinging by plaintiff, and referring to the United States law, the court said: "Under that law it cannot be doubted that it is bounded by the lines of its surface claim in favor of a subsequent locator." And further, that "those lines are fixed by the monuments on the ground, and they cannot be changed so as to interfere with other claims subsequently located."

In this case the court also said: "The requirements of the law, as to what the record shall show, are evidently designed to fix the *locus* of the claim, in order to prevent floating."

"Marking the boundaries of the surface claim, as required by statute, is one of the first steps toward a location. It serves a double purpose. It operates to determine the right of the claimant as between himself and the general government, and to notify third persons of his rights. Another, seeking the

benefits of the law, going upon the ground, is distinctly notified of the appropriation, and can ascertain its boundaries. He may thus make his own location with certainty, knowing that the boundaries of the other cannot be changed so as to encroach on ground duly appropriated prior to the change. The prevention of frauds by swinging or floating is one of the purposes served." *Pollard v. Shively*, 2 Morr. Min. Rep. 229. In the supreme court of the United States, Mr. Justice Field said: "The question is therefore whether the location of a vein or lode as running in a certain direction but not marked on the surface for years, nor developed, but simply indicated by a notice, will be allowed to prevail against a claim subsequently located by another party on ground different from that thus indicated, after the latter has been developed by years of labor and large expenditure, without objection by the first locators, because subsequent explorations by them disclose the fact that their veins run in a different direction from what they supposed, and in their true course cover the subsequent claim. We do not think that the first claimants under these circumstances can appropriate the second claim. It is true the locators of the Omaha claim intended to take the vein or lode and were ignorant of its true direction. But it was incumbent upon them to make explorations and ascertain its true course, and indicate it in some public and visible manner, so that others might not be excluded from explorations on adjacent ground or be deprived of the benefit of their labor. *O'Reilly v. Campbell*, 116 U. S. 419, 6 Sup. Ct. Rep. 421.

The locator cannot change his lines to the injury of an intervener. *Cræsus Co. v. Colorado Co.*, 1 W. C. Rep. 451, cited 9 Morr. 560.

In the case of *King v. Amy & Silversmith Con. Mining Co.*, 24 Pac. 203, the court says: "The United States cases cited by the counsel are: *Mining Co. v. Tarbet*, 98 U. S. 463; *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177; *Argentine Mining Co. v. Terrible Mining Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356. If there be one legal principle that is announced with more clearness and frequency than all others throughout all these cases, it is, that 'the boundary planes shall be definitely determined by the lines of the surface location, and that they shall not be subject

to perpetual readjustment according to subterranean developments made by mine workings.' '' *The Elgin Case*, 118 U. S. 207, 6 Sup. Ct. Rep. 1177.

Justice Field says in the Elgin case, 118 U. S. 207, 6 Sup. Ct. Rep. 1177: "If the first locator will not, or cannot, make the explorations necessary to ascertain the true course of the vein, and draws his end-lines ignorantly, he must bear the consequences. . . . Junior locators will not be prejudiced thereby, though subsequent explorations may show that he erred in his location."

"The miner is left free to make his choice of location as he sees fit, and ample opportunity is given him to determine the situation of his lode or vein. If he makes this choice without sufficient explorations to guide him in making the location, the blame rests upon himself." *McCormick v. Varnes*, 9 Morr. 512.

Has it not been conceded that the original locators of the Black Eagle claim had "ample opportunity" to determine the course of their lode, providing there was one within their claim, and make or amend their location notice accordingly, before the subsequent location of the Little Comet? The Black Eagle was located January 1, 1882. Its location notice was recorded January 3, 1882, and has never been altered or amended.

Defendants' claim, the Little Comet Mine, was not located until January 1, 1885. The location notice of the Black Eagle purported to claim a lode extending in a certain direction, and this location notice had been of record for three years, unaltered and unamended, at the time the defendants' Little Comet was located.

Were the original locators of the Little Comet to abstain from locating a claim on a lode known to extend in an entirely different direction from that indicated in the Black Eagle notice?

True, if the Black Eagle had a lode as indicated by its location notice, the two lodes were ultimately bound to intersect or cross. But as Congress had seen fit to protect the right of the subsequent locator to his cross-lode, when such contingency should arise (Rev. Stats. U. S., sec. 2336), the mere fact that the ore within the space of intersection of the two lodes would belong to the senior location would hardly

be sufficient to deter the locators of the Little Comet from making their location.

Whatever rights the plaintiff may claim under section 2322 of the Revised Statutes of the United States must yield to the right of defendants to their cross-lode, which they claim they are lawfully entitled to, under section 2336; for, "as between conflicting statutes, the latest in date will prevail, and as between conflicting sections of the same statute, the last in order of arrangement will control." *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669; *Hall v. Equator M. and S. Co.*, Morr. Min. Rights, 3d ed. 232; *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436; *Coffee v. Emigh*, 15 Colo. 184, 25 Pac. 83.

"If a conflict exists between two statutes or provisions, the earlier in enactment or position is repealed by the later. *Leges posteriores priores contrarias abrogant*. Where there is an irreconcilable conflict between different sections or parts of the same statute the last words stand, and those which are in conflict with them, so far as there is a conflict, are repealed; that is, the part of a statute later in position in the same act or section is deemed later in time, and prevails over repugnant parts occurring before, though enacted and to take effect at the same time. This rule is applicable where no reasonable construction will harmonize the parts. It is presumed that each part of a statute is intended to coact with each other part; that no part is intended to antagonize the general purpose of the enactment." Sutherland on Statutory Construction, sec. 160, pp. 214, 215.

"When a junior location crosses a senior location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side-lines of the senior location, except at the intersection of the two veins. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein." *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77; *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669; *Morgenson v. Middlesex etc. Co.*, 11 Colo. 177, 17 Pac. 513; *Coffee v. Emigh*, 15 Colo. 184, 25 Pac. 83; *Omar v. Soper*, 11 Colo. 389, 7 Am. St. Rep. 246, 18 Pac. 443; *Hall v. Equator*, Morr. Min. Rights, 282.

"And upon a grant of the cross-vein itself, such right of way would pass as an incident of the grant." *Branagan v.*

Dulaney, 8 Colo. 408, 8 Pac. 669, aff. *Lee v. Stahl*, 9 Colo. 210, 11 Pac. 77; *Morgenson v. Middlesex etc. Co.*, 11 Colo. 179, 17 Pac. 513; *Farmers' etc. Co. v. Southworth*, 13 Colo. 117, 21 Pac. 1028.

And in commenting upon the additional rights granted to the miner by the act of 1872, Judge Field, in the celebrated Eureka case, said: "But these additional rights are granted subject to the limitation that in following the veins, lodes, or ledges, the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end-lines of his location, and a further limitation upon his right in cases where two or more veins intersect or cross each other."

"The act [of 1872] in terms annexes these conditions to the possession not only of claims subsequently located, but to those previously located." *The Eureka Case*, 4 Saw. 324, Fed. Cas. No. 4548.

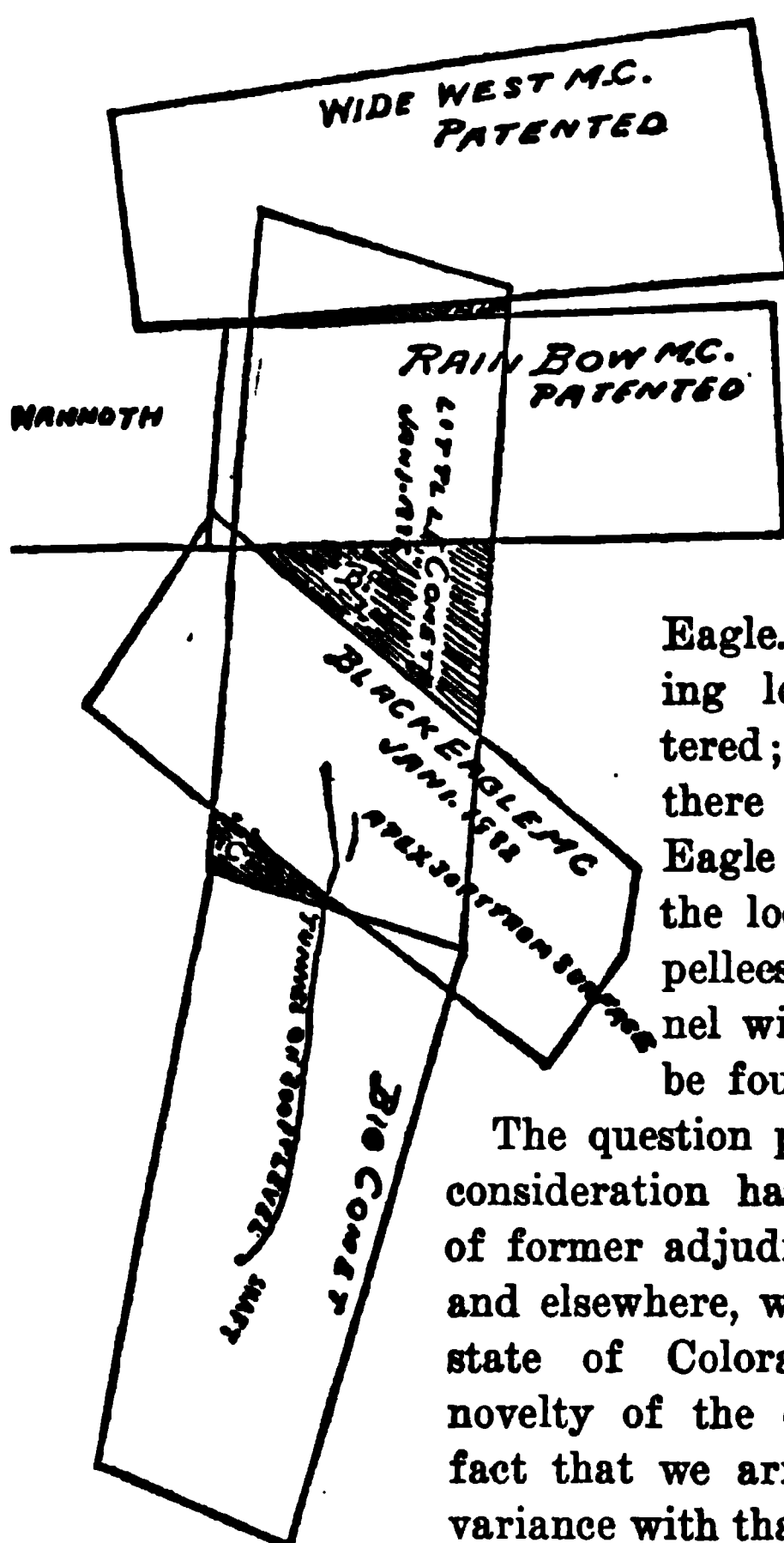
Referring to section 2336 of the Revised Statutes: "The construction which has been given to this part of the law is, that a party has a right to a patent for the number of feet along his lode or vein to which he has the local title, upon full compliance with the law and instructions; provided, however, that where another lode crosses, the ore at the space of intersection of the two lodes belongs to the party who owns the prior location of the two, whether patented first or second.

"The law clearly refers to cross-lodes, and provides that the ore at the crossing of the two lodes shall belong to the first valid location, and hence, where a patent issues for a mining claim which crosses one already patented, the surface ground in conflict is excepted from the second patent, but the subsequent patentee has the right under his patent to the lode for the distance patented, with the proviso hereinbefore referred to,—viz., that the ore at the space of intersection of the cross-lodes shall belong to the prior location." Weeks on Mineral Lands, sec. 185, p. 247; Copp's U. S. Mineral Lands, 470.

KIBBEY, J.—This action grew out of the assertion and exercise by the appellees (defendants below) of a disputed right to extract and appropriate silver ore from a lode lying within the boundary limits of the mining claim known as the "Black Eagle," owned by the appellant. The facts disclosed

by the record, so far as they are pertinent to the question presented to this court, are, that on the first day of January, 1882, the Black Eagle mining location was made; that since that time the claimants of that mine have performed all the statutory requirements essential to constitute it a valid mining claim. The Black Eagle claim lies in a northeasterly and southeasterly direction, and is approximately a parallelogram ——— feet in length and ——— feet in width. Appellant is the owner of the claim by several mesne conveyances from the original locators. Three years after the location of the Black Eagle Mine the Little Comet Mine was located, and the statutory requirements to constitute that a valid mining claim have been complied with. The appellees are the owners of the Little Comet Mine. The Little Comet claim intersects, and partially overlies the Black Eagle claim, so that a part of the Black Eagle and of the Little Comet lie within common boundaries. A distinct, well-defined lode of silver ore has been found and traced, by means of a tunnel driven on the lode, following its axis, for a distance of twelve hundred or fifteen hundred feet from a point within the boundaries of either claim to a point two hundred and eighty-five feet within the boundaries of the Black Eagle claim, and within the side-lines of the Little Comet. The entrance to the tunnel is at the three-hundred-foot level, on the Big Comet Mine, owned and operated by the appellees, and of which the Little Comet is practically a northern extension. The apex of the lode, so far as it has been disclosed by development, is within the side-lines of the Big Comet, as well as of its extension,—the Little Comet,—and about two hundred and eighty-five feet of its extent, as developed, is also within the surface boundaries of the Black Eagle. The diagram on the following page will denote the relative positions of the several claims, and of the workings thereon.

The appellees have driven their tunnel into the ground within the Black Eagle claim, as denoted on the diagram, appropriated the ore found therein, and claim the ownership thereof, and threaten to continue to extract and appropriate the ore therefrom. The appellant claims the ownership of the ore, and the right to mine it, under the provisions of section 2322 of the Revised Statutes of the United States. Appellees claim the ownership of the ore,



except that at the space of actual intersection of the lodes, under the provisions of section 2336 of the Revised Statutes of the United States, asserting that the lode on the Little Comet crosses or intersects a lode on the Black

Eagle. In fact, no intersecting lode has been encountered; but the court finds that there is a lode on the Black Eagle which, inferentially, the lode upon which the appellees have driven their tunnel will, if further exploited, be found to intersect.

The question presented to us for our consideration has not been the subject of former adjudication in this territory and elsewhere, we believe, except in the state of Colorado. Because of the novelty of the question here, and the fact that we arrive at a conclusion at variance with that of the Colorado court, we feel justified in stating more at length the reason for our conclusion than we should otherwise do.

Our mining laws have grown from, and been suggested by, the practice of the miners themselves. As from time to time conditions changed, the miners framed rules applicable thereto. These rules had no reference in the first instance to the acquisition of the title, either to the mineral or to the land in which it was found. The title was, admittedly, at least in the western states, in the United States. But that title was ignored by the early miners, and the invasion of the rights of the United States by the miners in entering upon its lands and extracting therefrom and appropriating the valuable minerals, was not resented by that government. The rules of

the miners referred almost exclusively to the ascertainment and enforcement of their individual claims as among themselves. At first, and until 1872, the substantial thing claimed by the miner was the lode-bearing mineral. He cared nothing for the soil or land itself, except as it was a necessary adjunct to the process of mining. His only claim to the surface was, that he might have a place whereon to erect his mill, his hoisting-works, and, if he desired, to live, and to deposit the débris resulting from the process of mining. His only claim to the ground below the surface, outside the limits of his lode, was to its use for reaching and extracting the ore from his lode by tunneling, drifting, etc., or to obtain the water necessary for carrying on his mining operations. His right to extract mineral was confined to the limits of the lode that he had discovered and located. The right was dependent upon discovery, and the observance of, and compliance with, certain rules prescribed by the miners themselves or by local statute, designed chiefly to give publicity and certainty to the fact and extent of his claim, and to afford evidence of his good faith in the location. These rules almost from the beginning limited the extent of the lode which might be claimed. It was provided that the miner should not have more than a designated number of feet of the lode he might discover and locate, to be measured along the course of the lode itself. With the lode he acquired the right to all its dips, angles, spurs, and variations; but he acquired no right to any cross or intersecting lode, or to any parallel lode. His claim was to the lode which he had discovered and located, staked, monumented, and exploited in the manner prescribed by the miners' rules and the local statutes, and to all its dips, angles, spurs, and variations which were a substantial part of it. So long as he was able to establish that any particular ore body was a part of the lode that he had legally located, and was within the longitudinal limits of his claim, he established his right to that ore. To isolate his lode from all others was to define his claim. It is well known that lodes are not uniform in their course, their dip, or in any of their dimensions, nor in the character of the ore that they carry; that in their course, and upon their dip, they may divide, and may or may not reunite; that there may be a principal, or, as miners sometimes denominate it, a "mother," lode; diverging from it are

spurs, offshoots, or branch lodes; that the lodes are subject to faults or displacement of their fractured ends, breaking the continuity of the lode; that the lode may be crossed on its strike or course, or upon its dip, by other and distinct lodes of similar or different character; that a lode may in parts of its course be overlain by an adjacent lode; that a lode may at any part of its strike, or upon its dip, "pinch out" or vanish. These incidental characteristics of ore lodes cannot be determined except by complete exploration of the lode itself. Indeed, not all of them can be ascertained until after the complete removal of all the lode material, leaving only the matrix. The miner cannot know what is in advance of his drill in any direction. He cannot often, with any probability of fulfillment, predict.

The first act of Congress recognizing the rights of miners was in 1866, which, among other things, provided for patenting to persons who claimed a lode of quartz, or other rock in place, bearing gold, silver, etc. Here Congress recognized the customs and rules of the miners, whereby the claim was to the lode, as distinguished from the land itself. It was inevitable from this condition of things that disputes should arise among rival claimants to mineral-bearing lodes. The question of priority of discovery and notice and of the extent of the claim were of easy solution. The question of the identity of the lode presented almost insurmountable obstacles. True, lawsuits were instituted and decided. Courts found that ore found in one place was from the same lode as that discovered, maybe, one thousand feet away. Mining experts and geologists projected into the realm of fact their theories and their guesses. This was the best that could be done. Certainty was impossible. An approach to it was improbable. Mining rights were most precarious. The miner's right to that part of the lode at his discovery shaft was subject to defeasance by establishing that he was upon but a spur of his neighbor's lode and not on his lode. These conditions were provocative of disputes and of consequent litigation. They afforded a premium to the unscrupulous to institute lawsuits, for in them the chances of success for the unjust and the just were about equal. It was but a lottery.

In 1872 Congress enacted a new mining law. We may surely assume that Congress well knew of the evils arising

from the application of the old rule relative to the acquisition of mining rights. By section 2319 of the Revised Statutes of the United States, it is provided "that all valuable mineral deposits in lands belonging to the United States . . . are hereby declared to be free and open to exploration and purchase; and the lands in which they are found, to occupation and purchase." For the first time we here find the land in which mineral is found to be a substantial, integral part of the claim. Section 2322 gives not the lode alone, but all lodes, veins, and ledges, throughout their entire depth, the top or apex of which lies inside of the surface lines of the claim extended downward vertically; and as lodes may dip, so that, when followed, they may be found to extend beyond the boundaries of the claim, Congress further provides that they may nevertheless be followed, but that the locator shall be entitled only to such part thereof as lies between vertical planes drawn downward through the end-lines of the claim. In other words, Congress has said to the miners: "Comply with the requirements that we impose, and the government of the United States will grant absolutely to you a piece of the earth, bounded at the surface by straight lines distinctly marked, and by planes extending through those lines to the center of the earth; and you shall have all lodes of mineral-bearing rock whose apex is within those boundaries." This is simple, plain, and the miner's rights are thereunder easy of ascertainment. He does not have to trouble with dips, spurs, and angles. If he or another makes dozens of distinct discoveries of one lode, or of a dozen different lodes, which have their apex within his boundaries, he is not concerned about their identity. No one can question his right to them. They are all within his slice of the earth, and by the express terms of the statute they are his. In two instances contemplated by the statute he may pursue a lode beyond the limits of his claim, or the ground within the boundaries of his claim may be invaded by an adjacent proprietor: First, when the lode, having its apex within the boundaries of his claim, shall dip beyond them (but even in that event he is limited by the planes passing through the end-lines of his claim); and second, when a locator shall have located a lode prior to the tenth day of May, 1872, under the mining laws then in force, and shall, as against a subsequent and overlapping claim, have

saved his right to his lode in the manner prescribed in the act of 1872. In the latter case the prior locator may follow his lode upon its strike or dip into other ground than his own. It will immediately suggest itself to a legislator that where a miner may follow a lode outside of his boundaries he might encounter adverse rights in an adjoining claim. His lode might intersect a lode of an adjoining claim or it might unite with it. With this in mind, Congress enacted section 2336, whereby provision is made for the determination of what would otherwise be conflicting claims. It provides that at the space of the intersection of such lodes the oldest locator shall have the ore, and that the junior locator shall have a right of way through that space, to pursue and work his lode; that if there be a union of two lodes the senior locator shall take the ore at the space of intersection or union and all of the lode below the point of union. These two sections, so construed, completely define and make easy of ascertainment the rights of the miner. They are easily applicable to any conditions that may arise, and eliminate from consideration all perplexing questions that attend an attempt to identify, define, and isolate lodes. But we are asked to put a different construction upon section 2336,—a construction that admittedly renders that section repugnant to section 2322. We are asked to go still further, and hold that section 2336, to the extent of such repugnancy, repeals by implication the provisions of section 2322. Counsel for the appellees have argued the question with great earnestness and ingenuity.

Preliminary, however, to the discussion of that question, we wish to dispose of another. It was argued during the presentation of this case by the appellees that a mining claim, to be valid, must be located along the course of a lode; that the statute contemplates that it shall be so done. The statute, as we understand it, only intends to prescribe the limit of extent along the course of the lode that the locator may claim, not that he shall locate so that the greatest dimension of his claim shall coincide with the course of the lode. It is provided that the extreme extent along the lode shall not exceed fifteen hundred feet. It may be less. And if the miner in making his location should mistake the direction of the lode upon which he locates, and accordingly make the extreme dimensions of his claim in a direction other than

that of the lode, that fact does not invalidate his claim, but only operates to diminish the extent of the lode that he might have included within the boundaries of his claim. Of course, Congress expected that the miner would avail himself of the privilege accorded him and locate along the course of the lode, but it does not require him to do so. The only result of not so locating is, that the locator gets less in extent of the lode than he otherwise would have located, and that if the side-lines instead of the end-lines cross the course of the lode, in order to define the locator's rights to pursue the lode on its dip the side-lines will be treated as end-lines. *Mining Co. v. Tarbet*, 98 U. S. 463.

Section 2322 of the Revised Statutes of the United States is as follows: "Sec. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended down vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior part of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends, in its downward course, beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another." And section 2336 is as follows: "Sec. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of

intersection, but the subsequent location shall have the right of way through the space of intersection for the purposes of convenient working of the mine; and, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The appellees claim that they discovered a lode of ore subsequent in point of time to the location of the appellant's mine,—the Black Eagle,—the discovery being at a point on the lode south and outside of the surface limits of the Black Eagle claim; that they have traced that lode by tunneling within its walls a considerable distance into the ground of the Black Eagle; that that which is inferentially the same lode has been discovered at a point north of the Black Eagle claim; that these points of discovery are on the general strike of the lode, which is traced from a point from the Miner's Dream claim northwardly through the length of the Big Comet, and on the same general course into the Little Comet and the Black Eagle, to the point of dispute. There seems to be no reasonable doubt of the identity of the lode on its course from the Miner's Dream to the face of the tunnel in the ground of the Black Eagle. The appellees in their answer allege that up to that time this lode had not encountered or crossed any other lode or vein, but they urge that inasmuch as the court below finds that the Black Eagle is a valid mining claim, it must have found, as a condition precedent to the validity of the claim, the fact that there was upon that claim a lode, vein, or ledge containing quartz or other rock bearing mineral. There is in the record evidence that discoveries of ore were made in several places on the Black Eagle claim, and that if a line were drawn connecting these several points of discovery, that line, if extended in the same general course, would cross the supposed course of what for convenience of expression we may call the Little Comet lode. The fact of an actual crossing or intersection of two lodes is not testified to, admitted, or proved. Appellees contend that the inference of the facts testified to is aided by the presumption that the Black Eagle claim was located longitudinally along the course of a lode, and that therefrom it must be inferred that there is an actual intersection somewhere within the limits of both the Black Eagle and the Little Comet of the Little Comet

lode and some lode in the Black Eagle; and upon the existence of the fact of such a crossing the appellees claim that section 2336 gives them the right to all the ore in the Little Comet lode within the boundaries of that claim, whether within the boundaries of the Black Eagle or not, except the ore within the "space of intersection." We cannot doubt that the expression, the "ore within the space of intersection," means that body of ore bounded by the foot- and hanging-walls of one lode extended in a general course of that lode and the foot- and the hanging-walls of the intersecting lode extended upon its general course. It is only to this body of ore, limited as we have noted, that section 2336 relates. In one instance the body of ore is given to the prior locator, and in the other a right of way is given through that body of ore to the junior locator. It cannot relate to ore outside of the space of intersection. It does not do so in terms, and we do not feel justified to extend it by construction. By section 2322 we think it clear that a locator cannot go outside of any of his lines on the strike or course of any lode, except under rights acquired by him prior to the enactment of 1872, and saved to him under the provisions of that act. That doctrine is clearly enunciated in the Flagstaff case, before cited. The right of the miner to go beyond the limits of his claim on the strike of a lode can only be given by the construction of section 2336 claimed by the appellees; and that is, that that section was designed to give a new right where lodes in fact cross, and not to define and settle prior existing rights at the space of intersection. In other words, that if a lode on a junior location intersects on its strike within the boundaries of a senior location a lode on such senior location, then the junior locator may take all the ore in the first-mentioned lode within the boundaries of both the senior and junior location, except at the space of intersection, notwithstanding that section 2322 limits the locator to his own boundaries, except when pursuing a lode on its dip, and that to this extent section 2336 repeals section 2322. There need be here no discussion of appellees' proposition that, as between conflicting sections of the same statute, the last in the order of arrangement shall prevail. In this connection we may only add that Mr. Sutherland, in his work on Statutory Construction, cited by the appellees, in the same section wherein he announces

this canon of statutory construction, says: "This rule is applicable where no reasonable construction will harmonize the parts. It is presumed that each part of a statute is intended to coact with every other part; that no part is intended to antagonize the general purpose of the enactment." Sutherland on Statutory Construction, sec. 160. Do sections 2322 and 2336 conflict? Can they be harmonized by reasonable construction? We have indicated our construction of the two sections. They are thereby in complete harmony, and coact for the accomplishment of what seems to us to be the very purpose of the statute,—i. e. the establishment of a rule for the easy definition of miners' rights, and the elimination therefrom of the uncertainties of the old rule; the substitute for the lode claim, which must always be uncertain and provocative of disputes in its practicable application, of the easily and well-defined segment of the earth, with its mineral contents. Appellees assert that when a junior location crosses a prior location, and the lodes therein are cross-lodes, the junior locator is entitled to all the ore found in his lode within the side-lines of the senior location, except at the space of the intersection of the two lodes. In such case the prior locator has the right of way for the purpose of excavating and taking away the mineral in the cross-vein. These propositions contain two elements that are not contemplated, at least in terms, by the statute. The statute does not in any place contemplate a crossing of locations. It does not say so. To so construe it is to say that "cross-lodes" or "veins" mean cross-locations; and if we are to adopt that meaning,—a plain distortion of the statute,—we must be consistent, and read section 2336 with the words "cross-locations" wherever the words "cross-lodes" appear. The words used mean one or the other, or both, but certainly not the first only, or the second only, to the exclusion of the other, to suit convenience. We do not wish to be understood to accede to the proposition that "lode, vein, or ledge" means other than "lode, vein, and ledge." It is the grossest brutality of statutory construction to attempt to construe those words to mean "locations" or "claims." But it seems to us that appellees are no better off even with that substitution. Reading that section as if the word was "location" instead of "vein or lode," even then appellees, not having the prior location, would have no right to

any ore within the space of intersection of the claims. In that event the space of intersection is the space bounded by the side-lines of the Black Eagle on the north and south, and by the side-lines of the Little Comet on the east and west; and by section 2336 the ore therein belongs to the oldest locator,—i. e. the appellant, or owner of the Black Eagle. At most, the appellees could have a right of way only through this space of intersection whereby to reach and extract their ore north of, and beyond, the Black Eagle's north side-line. The first case in which there is a construction of section 2336 to which our attention has been called is the case of *Hall v. Mining Co.*, Morr. Min. Rights, at page 282. The opinion was delivered by Hallett, United States district judge for the district of Colorado. The great reputation of Judge Hallett for erudition, especially in questions involving mining rights, gives rise to much diffidence upon our part in attempting to criticise his decision in that case. The decision in that case was upon a motion to dissolve an injunction. It seems that the Colorado Central lode and the Equator lode, in the Griffith Mining District, in Colorado, were both patented lodes. The patent for the Central lode is senior to that of the Equator, but its location is junior to that of the Equator, the location of the Equator lode having been made in 1866. The patents to each were in 1875. Each location was fifty feet in width, and one was fourteen hundred and the other fifteen hundred feet in length. Their general course was east and west, the course of one departing about twelve degrees from that of the other. The east end of the Central overlapped the west end of the Equator in such a way as to leave a small part of each projecting beyond the north side-lines of the other. It further appears "that," in the language of Judge Hallett, "these locations were made as and for different lodes, crossing each other with an acute angle of about twelve degrees, and each extending beyond the lines of the other for a distance of more than two hundred feet." The dispute in the case arose over the ownership of ore in a body of ore found in or under the east end of the Central, and thence extending westward to and across the intersection with the Equator location. Premising that any priorities acquired by private discoveries or locations are merged in the patents, and that priority of right thereafter depends on priority of patent, Judge Hallett pro-

ceeds to the consideration of section 2322 and 2336. He says: "The general language of section 2322 seems to comprehend all lodes having their tops and apexes in the territory described by the patent, whether the same lie transversely or collaterally to the principal lode on which the location was made. Considered by itself, such would be the meaning and effect of that section. But there is another section relating to cross-lodes which is of different import." He then quotes section 2336, and proceeds: "It will be observed that by this section the first locator and patentee of a lode gets only such part of cross and intersecting veins as lie within the space of intersection, to the exclusion of the remainder of such lode and veins lying within his own territory." And this is all that Judge Hallett says upon the subject, except to say that therefore section 2336 repeals *pro tanto* section 2322, and deduces the conclusion that the subsequent patentee is entitled to all the intersecting lode, except at the space of intersection. If this is the construction of section 2336, then a locator of a mining claim does not become the owner of all the lodes, veins, and ledges in his segment of earth, whether there be a prior locator and patentee or not, for at the time of patent the first patentee is the only patentee. This seems a strange situation to us. It is a relegation of the whole system of acquirement of mining rights to the methods prevailing prior to 1872. The miners' rights are again made to depend on the existence of facts the establishment of which cannot be made until after the time of the enjoyment of the right is irrevocably gone. How can the miner know that the lode upon which he locates is not a cross-lode,—that is, a cross-lode in the sense Judge Hallett uses that term? It seems to us that Judge Hallett overlooked the fact that section 2336 referred to no rights whatever in cross-lodes, except at the point of intersection. It does not in terms, and we certainly think cannot by implication, relate to rights in any lode except at the space of intersection. Congress only contemplates that if A has a valid right to the ore in a given lode, and B the ore in another, and if those lodes happen at some point to intersect, then, by section 2336, their rights within the space of intersection are to be defined. The right of A to the ore in his lode, and of B in his, were not, and are not, in any wise dependent upon the fact of crossing. The learned judge seems

in one instance to designate by the term "cross-lode" a lode whose general course is along the shortest dimension of the claim, while in the other instance a lode which in fact crosses another lode. Every lode may in fact be both. If by "cross-lode" is meant a lode crossing a claim, what of a lode that is as nearly transverse as longitudinal? What of a lode that is partly transverse and partly longitudinal? If by "cross-lode" is meant a lode crossing another lode, where must the intersection be,—within or without the claim of one or the other, or of both of the claims of the contestants? How can it be known that in the latter sense a lode is a cross-lode until the fact of crossing is substantiated. May a man go upon a claim, work out the ore, and then find that his lode was a "cross-lode," and he thereby be made a trespasser *ab initio*, even as against a subsequent locator? The logical result of such a construction but confounds the confusion sought to be avoided.

We are next referred to the case of *Branagan v. Dulaney*, 8 Colo. 409, 8 Pac. 669. That case simply follows *Hall v. Mining Co.*, *supra*, decided by Judge Hallett, and is subject to the same criticism. The next case in chronological order is *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77. The court there simply follows the *Equator* case and *Branagan v. Dulaney*, without comment; and so with the other Colorado cases cited. We are cited to some decisions by the department of the interior. Without discussing them, we can only say that so far as they attempt to construe section 2336 as giving rights in any lode outside of the space of intersection with another lode, each of the intersecting lodes being owned by different persons, we cannot agree with them.

It was argued at the trial of this case that as a matter of fact lodes, veins, and ledges do not intersect, except upon their strike; that an instance of a crossing upon the dip of two veins was unknown, and that therefore section 2336 must refer to the crossing of lodes on their strike; that Congress would not legislate to define rights dependent upon a condition that can never happen. If it be true that an instance of two lodes intersecting upon their dip is unknown, that fact is only evidence, and we think very slight evidence, that they may not do so. It is a complete answer to that that lodes can cross on their dip. But we think it unimportant whether they

can or not. Congress had in mind at the time of the enactment of the law of 1872 that, as mining rights then stood, A's lode might legally cross B's lode on the strike, and whether on the dip or not makes no difference; and section 2336 was designed to define the rights of A and B in the space of intersection. Under the construction of sections 2322 and 2336 we are within the plain, unambiguous terms of the statute, giving to every part of it its full meaning and effect. It results in a beautifully simple means of defining mining rights. The construction urged by appellees, and supported by the Equator and subsequent Colorado decisions, violates the language of the statute, injects into it things not there, results in conflict in the statute among its parts, and makes infinitely more complex the old system of lode claims.

The case is reversed.

Gooding, C. J., Sloan, J., and Wells, J., concur.

[Criminal No. 75. Filed January 28, 1893.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
HENRY BLEVINS, Defendant and Appellant.**

1. CRIMINAL LAW — NECESSITY FOR PLEA.—Until the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment even after verdict.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Joseph H. Kibbey, Judge. Reversed.

The facts are stated in the opinion.

E. J. Edwards, for Appellant.

Miles Van Wagenen, District Attorney, for Respondent.

GOODING, C. J.—It appeared by the records in this case that the trial proceeded without a plea by the prisoner, and this being urged against the judgment in the case, we think

a new trial should be granted. "Until the defendant has plead to the indictment there was no issue to be submitted to the jury, and the omission to plead is fatal to the judgment even after verdict." *People v. Gaines*, 52 Cal. 481; *Douglass v. State*, 3 Wis. 820; *State v. Saunders*, 53 Mo. 324.

Sloan, J., concurred.

[Civil No. 360. Filed January 28, 1893.]

[33 Pac. 555.]

THE ARIZONA CATTLE COMPANY, Defendant and Appellant, v. EMILE HUBER et al., Plaintiffs and Appellees.

1. EXECUTORS AND ADMINISTRATORS—FOREIGN EXECUTORS—CAPACITY TO SUE.—An executor or administrator appointed in a foreign state may lawfully sue in this territory upon a judgment obtained by him in the place of his appointment, in his representative capacity, without taking out letters testamentary or letters of administration in this territory.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Edmund W. Wells, Judge. Affirmed.

The facts are stated in the opinion.

Stewart & Doe, for Appellant.

The court erred in overruling defendant's demurrer and plea in abatement, for the reason that the judgment upon which this action was brought was rendered in the state of New York in favor of plaintiffs, in their representative capacity, as executors under a will probated in the state of New York, and this action is brought by them, in their representative capacity, without any letters of administration, or other authority under the laws of the territory.

The powers of executors and administrators to sue, in the absence of special authorization by the laws of other states,

is limited to the state under the laws of which they derive their authority to act in such capacity. *Simpson v. Foster*, 46 Tex. 624; Story on Conflict of Laws, sec. 513; *Gordon v. Jones*, 3 Mass. 514; *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106; *Doolittle v. Lewis*, 7 Johns. 45; *Vaughn v. Barrett*, 5 Vt. 333, 26 Am. Dec. 306; *Stevens v. Gaylord*, 11 Mass. 256; *Shelden v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Dixon v. Ramsay*, 3 Cranch, 319; *Doe v. McFarland*, 9 Cranch, 151; *Vaughn v. Northrop*, 15 Pet. 1; *Noonan v. Bradley*, 9 Wall. 394; *Mosby v. Barron*, 52 Tex. 396; *Johnson v. Wilson*, 1 Pinn. 65.

Herndon & Hawkins, for Appellees.

The following authorities fully sustain the ruling of the lower court: *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; *Biddle v. Wilkins*, 1 Pet. 686; *Talmage v. Chapel*. 16 Mass. 71.

SLOAN, J.—Appellees, as the executors of the last will and testament of Otto Huber, deceased, brought suit in the district court of Coconino County against appellant company, upon a judgment obtained by them, as executors aforesaid against appellant, in the city court of the city of New York for the sum of \$1,073.87. The complaint recited that said Otto Huber died in the city of New York on the thirty-first day of August, 1889, leaving a last will and testament wherein and whereby appellees were named as the executors thereof; that thereafter the said will was duly probated before the surrogate of Kings County, in the state of New York, and letters testamentary duly issued thereunder, and that as such executors they obtained said judgment against said appellant as aforesaid. Appellant demurred to the complaint upon the ground that appellees had not legal capacity to sue, nor were entitled to recover in the capacity in which they sued, because it appeared upon the face of the complaint that the action was brought by them as executors of a will probated without the territory of Arizona, and in the state of New York, and not as individuals, and because the complaint did not allege their appointment, either as executors or administrators, within this territory, under or by virtue of the laws of this

territory. Appellant also pleaded, in abatement of the action, that Otto Huber, deceased, at the time of his death, was a resident of the state of New York, and that his will was never probated or offered for probate within this territory, and, further, that appellees, nor any of them, had been appointed administrators, either general or special, under the laws of, or within, this territory. Both the demurrer and plea in abatement were overruled by the trial court and judgment entered for appellees. From this judgment appellant appeals.

For convenience, we will consider both the demurrer and the plea in abatement as a single proposition, inasmuch as they involved, virtually, but one question, and that may be stated as follows: May an executor or administrator appointed in a foreign state lawfully sue in this territory upon a judgment obtained by him in the place of his appointment, in his representative capacity, without taking out letters testamentary or letters of administration in this territory? In *Biddle v. Wilkins*, 1 Pet. 685, the plaintiff brought suit in the United States district court for Mississippi upon a judgment recovered by him as administrator appointed in the state of Pennsylvania. The defendant pleaded that he was the duly appointed administrator of the same estate by virtue of letters of administration issued in the state of Mississippi. The court held that the plaintiff could sue upon the judgment in his personal capacity, it being in law his debt, and it made no difference whether the defendant had or had not been appointed administrator of the same estate in Mississippi. In the case of *Talmage v. Chapel*, 16 Mass. 71, it was held that where an administrator in New York obtains a judgment in that state, he alone could bring suit upon the judgment in the state of Massachusetts, and that his styling himself "administrator" in such suit was held to be merely descriptive, and not essential to his recovery. Mr. Freeman, in his work on Judgments (sec. 217), thus summarizes the law on this subject: "A debt due to the estate of a deceased person, if sued upon and recovered by an administrator, is in law the debt of him who recovers it, and in whose name the judgment is rendered. He holds the legal title subject only to his trust as administrator. He may sue upon the debt in his own name without describing himself as administrator, and may there-

fore pursue the judgment in a different state from that in which letters of administration were issued.” In *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833, the court held that the Code of Civil Procedure of that state did not affect or modify the general principle of law in this respect. Our own Practice Act nowhere changes the common law upon the subject. The cases cited by counsel for appellant do not apply. They appear to have overlooked the distinction between a case where a foreign administrator sues to collect a debt due in the state where suit is brought and a case where he sues upon a debt which has been merged in a judgment obtained by him in the state of his appointment. In the former the local administrator can alone sue, as such debts are assets which are to be administered upon in the state where due. In the latter the judgment becomes an asset in the state wherein it has been originally rendered. Again, there is no privity between persons to whom administration is granted in different states in the same estate. Hence, an administrator appointed in the estate of Otto Huber, deceased, by the probate court of Coconino County, could not sue upon the judgment rendered in New York in the name of the administrator appointed in that state. We see no error in the overruling of the demurrer or plea in abatement, and the judgment is therefore affirmed.

Gooding, C. J., and Kibbey, J., concur.

[Civil No. 350. Filed January 28, 1893.]

[32 Pac. 262.]

JAMES REILLY, Plaintiff and Appellant, v. T. A. ATCHISON, Defendant and Appellee.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—MUST BE SPECIFIC.—
An assignment of error referring this court to pages 13 to 18 of the transcript is too general, and will not be considered.
2. BONDS—STATUTORY APPEAL-BOND—SURETY NOT LIABLE TO APPELLEE WHERE APPEAL WAS DISMISSED ON HIS MOTION FOR INSUFFICIENCY.—
—No recovery can be had upon a bond given as a statutory appeal-

bond as against a surety where the appeal was dismissed on motion of plaintiff on the ground of the insufficiency of such bond.

8. SAME—VOLUNTARY BOND — LIABILITY OF SURETIES — NECESSITY FOR ACCEPTANCE AND DELIVERY.—An appeal-bond, not good as a statutory bond, does not become binding on the sureties as a voluntary bond, because it was never accepted or delivered.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

James Reilly, *pro se*.

C. S. Clark, for Appellee.

WELLS, J.—This action grew out of the following facts: The appellant recovered a judgment in the district court of the first district against Henry T. Baldrige on the twentieth day of May, 1889, from which judgment Baldrige appealed to this court. The appeal was dismissed, upon motion of Reilly, on the ground that the purported appeal-bond was not a sufficient bond, as required by the statutes, to give this court jurisdiction to hear the appeal. The appellant above brought this action to recover against the appellee as a surety on said purported bond. Appellee had judgment, and the plaintiff appealed.

The error complained of must be specifically specified, so that the court may know upon what the appellant relies. The first assignment refers the court to pages 13 to 18 of the transcript. The assignment is too general, and will not be considered.

The other assignment is, that the court erred in deciding that the instrument sued on was not sufficient to sustain a recovery. The instrument sued on is not such a bond as is required by the statute for a bond on appeal, nor is it substantially a statutory bond. Such was the ruling of this court in dismissing the appeal in the case of Baldrige against Reilly. The dismissal was had upon the motion of said Reilly, on the ground of the insufficiency of such instrument as a bond on appeal. The bond, not being such as the

statute required, did not in law operate to stay execution on the judgment referred to in it. It was not valid as against the appellee, had he proceeded to enforce his judgment. He was not concluded by it. There was no consideration for it.

Appellant suggests that if it is not good as a statutory bond, may it not be a good voluntary bond? We do not think it meets the requirements of a valid instrument of that character. There is no obligee or payee mentioned in the instrument, nor was it delivered to and accepted by the appellee. He in no manner expressed an assent to it. If anything, the giving of the bond was antagonistic to appellee's wishes. These are essential requisites. It must be delivered by the party whose bond it is to the other. Its delivery to and filing by the clerk of the court was not such a delivery as to make it a voluntary bond. It was not such a bond as the clerk was authorized to approve; nor was he the agent of the obligee, or received it in that capacity. Without a legal delivery the surety on a voluntary obligation is not bound.

The bond not conforming to the statute, so far as to make it a statutory bond, or not becoming binding on the sureties as a voluntary bond because not delivered and accepted, the necessary conclusion is, that no recovery can be had, where a defense is made upon that ground. The judgment of the lower court should be affirmed, and it is so ordered.

Gooding, C. J., and Kibbey, J., concur.

[Criminal No. 76. Filed January 28, 1893.]

[33 Pac. 618.]

THE TERRITORY OF ARIZONA, Plaintiff and Appellant,
v. PHIL HEFLEY et al., Defendants and Respondents.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — REV. STATS. ARIZ. 1887, PENAL CODE, SEC. 775, CONSTRUED AND HELD UNCONSTITUTIONAL — U. S. CONSTITUTION, AMENDMENT 6, CITED — WITNESSES — COMPULSORY PROCESS — PRESUMPTIONS — LARCENY WITHOUT STATE. — Section 775, *supra*, providing that whoever, in another state or country, steals the property of another and brings it into this territory may be convicted and punished as if the larceny had been committed

in this territory, is not unconstitutional because it attempts to give our courts extraterritorial jurisdiction, but is open to two other objections. The constitution of the United States, amendment 6, provides that in criminal prosecutions the accused shall have compulsory process for obtaining witnesses, and, as process of this court cannot run without the territory where the witnesses as to the larceny, the essence of the offense, are, the law, which necessarily in its operation denies that right, is unconstitutional. Again, by the same amendment, the accused is entitled "to be informed of the nature and cause of the accusation," and there being no presumption that the common-law offense of larceny exists in Sonora, the accused cannot be informed of the offense attempted to be charged.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

William Herring, Attorney-General, and Allen R. English, District Attorney, for Appellant.

C. S. Clark, and William H. Barnes, for Appellees.

KIBBEY, J.—Phil Hefley and Thomas Jones, the respondents, were indicted in the court below, and charged with the commission of grand larceny in the state of Sonora, in the republic of Mexico, and unlawfully and feloniously bringing the stolen property into the county of Cochise, in the territory of Arizona. The respondents demurred to the indictment, and the demurrer was sustained. It is from this ruling that the territory appeals. We are not provided with a brief by the respondents.

Section 775 of our Penal Code provides that whoever in another state or country steals the property of another and brings it into this territory may be convicted and punished as if the larceny had been committed in this territory. The offense here created is not the larceny of the goods. It consists of two essential elements,—i. e. larceny in a foreign jurisdiction, and the bringing by the thief of the stolen goods into this territory. It would not, we think, be contended that had the defendants committed larceny in Sonora, and then afterwards come into Arizona, the courts of this territory would have any jurisdiction over the offense. The gist of the

offense is the bringing by the thief of stolen goods into the territory. We judge from appellant's brief that the court below held section 775 unconstitutional because it attempted to give to our courts extraterritorial jurisdiction, or, in other words, jurisdiction of an offense committed without our territorial limits. We do not think the statute obnoxious to this objection, and the cases cited by appellant go chiefly to that point.

The statute is open, however, to two other objections: The constitution provides that in criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor. Const. U. S. Amend. 6. As we have noted, larceny committed out of the territory in a place where process of the courts of this territory cannot run is of the essence of the offense. The presumption would be, that the witnesses to disprove the larceny are without the jurisdiction of the court, and not amenable to its process. True, as it may be answered, the defendants are nevertheless entitled to have process. But the process is but a means to an end, and the right guaranteed is to have the actual attendance of witnesses; and if a law is made which necessarily in its operation denies that right, it is, we think, unconstitutional.

Again, by the same amendment, the accused is entitled "to be informed of the nature and cause of the accusation." What is the nature of the accusation in that case? Is the larceny to be larceny as defined by our statute, as defined at common law, or as defined by the laws of Sonora? We cannot presume the common-law offense of larceny to exist in Sonora. Indeed, we must presume that it does not. We do not know whether any such offense as "larceny" or "stealing" exists in Sonora, or, if we presume that there is some cognate offense, we do not know its definitive characteristics. What may be larceny here may not be larceny there. Those acts here that constitute an unlawful stealing and driving away of cattle of another, may not in Sonora constitute an unlawful stealing, taking, and carrying away. Those acts done here that make the accused a thief, and his possession of the subject of the theft wrongful, may not in Sonora make him a thief, and his possession of the property would be entirely lawful. If lawful there, his bringing here that to which he is lawfully entitled might not be deemed a crime. Classes of property

in this country that are subjects of larceny may not be so in Sonora, and *e converso*. We think then that the "nature of the accusation" in cases contemplated by section 775 is too indefinite, and that the accused cannot be informed of the offense attempted to be charged thereunder. We think the demurrer was properly sustained, and the judgment is accordingly affirmed.

Gooding, C. J., and Wells, J., concur.

[Civil No. 347. Filed January 28, 1893.]

[33 Pac. 501.]

EMMA J. GONZALES, Plaintiff and Appellant, v. E. W. FRENCH et al., Defendants and Appellees.

1. PUBLIC LANDS — SCHOOL LANDS — PRE-EMPTION—ASSIGNMENT—REV. STATS. U. S. 1878, SECS. 1946, 2275, CONSTRUED—SECTION 2263 CITED.—Section 1946, *supra*, provides that sections sixteen and thirty-six in each township of certain territories, including Arizona, shall be reserved for school purposes. Section 2275, *supra*, provides that where settlements with a view to pre-emption have been made before survey, which are found to be on school sections, those sections shall be subject to the pre-emption claim of such settlers, and if they have been or shall be reserved for school purposes, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors. Under these sections the right of pre-emption of school lands is personal to settlers found upon school lands at the time of the survey of the lands in the field. In this case the settlers failed to assert any claim themselves to pre-emption, but sold their possessions and improvements after survey to appellant. The right being personal, appellant did not succeed thereto, nor was the land ever divested of its character of school land. In addition, section 2263, *supra*, forbids any assignment of the pre-emption right, and appellant could not lawfully succeed to any rights of the prior settlers to the land.

AFFIRMED.—*Gonzales v. French*, 164 U. S. 338, 41 L. Ed. 458, 17 Sup. Ct. Rep. 102.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Edmund W. Wells, Judge. Affirmed.

The facts are stated in the opinion.

J. F. Wilson, for Appellant.

W. L. Van Horn, and Stewart & Doe, for Appellees.

SLOAN, J.—Appellant, Emma J. Gonzales, seeks in this action to have appellee J. E. Jones, probate judge of Coconino County, and, as such, trustee of the patent of the townsite of Flagstaff, and successor, as such trustee, of appellee E. W. French, probate judge of Yavapai County, declared the trustee for her use and benefit of certain of the lands embraced in the premises covered by said patent. The facts upon which she relies to establish her right to the relief demanded, as stated in her complaint, are substantially as follows: That in the year 1876, Thomas F. McMillan, Frank Christie, and Conrad Farriner, who were then and there qualified to enter lands under the pre-emption laws of the United States, located and settled upon lands subsequently ascertained after survey to be a part of section 16 in township 21 north, of range 7 east, Gila and Salt River Meridian; and prior to the survey of said land in the field cultivated and improved by building residences thereon, with a view of making permanent homes thereon, and obtaining title thereto by pre-emption under the pre-emption laws of the United States as soon as the same should become subject thereto. That in 1878 a survey in the field was made of the township of which said section is a part, which survey, together with the plat of the same, was approved February 3, 1879, and the settlements and improvements made by said settlers McMillan and Farriner found to be on said section 16. That in June, 1883, Christie having meanwhile died, said McMillan and Farriner sold, transferred, and assigned their possessory rights, together with the improvements made by them on said section 16, to appellant, who immediately took possession, and has ever since resided on said land, and has made lasting and valuable improvements thereon. That on the second day of April, 1885, appellant, a citizen of the United States, the head of a family, and *feme sole*, applied to the register and receiver of the land office at the city of Prescott, A. T., as such settler on such land, to file her declaratory statement, and to enter the same under the pre-emption laws of the

United States, and offered and tendered then and there to such officers the necessary fees for such filing and entry. That at the time appellant applied to make her said entry no other person or persons had settled or offered to make any filing on said land, nor was there any adverse claim *in esse*, or any adverse claimant known. That her said application to file on and enter said land, as aforesaid, was refused and rejected by said United States land officers at Prescott, who still refuse to permit said filing, although repeatedly thereafter so requested by appellant. That on the thirteenth day of February, 1889, Congress passed an act entitled "A bill for the relief of the inhabitants of the town of Flagstaff, county of Yavapai, territory of Arizona." Omitting the enacting clause, the act was as follows: "That the probate judge of Yavapai County, territory of Arizona, be, and he is hereby authorized to enter, in trust for the occupants and inhabitants of Flagstaff, for townsite purposes, the south half of section sixteen (16), township twenty-one (21) north, of range seven (7) east, Gila and Salt River Meridian, in the territory of Arizona, subject to the provisions of sections 2387, 2388, and 2389 of chapter eight of the Revised Statutes of the United States relating to townsites. Sec. 2. That upon the passage of this act the territory of Arizona, through its proper officers, shall be, and is hereby, authorized to select as indemnity for said land and in full satisfaction thereof, and for the purpose stated in section 1946 of the Revised Statutes, one-half section [or three hundred and twenty acres] of public lands, at any office in said territory, said selections to be made according to legal subdivisions and contiguous." That the lands occupied and settled upon by appellant, as aforesaid, were embraced in said south half of section 16. That on June 17, 1889, E. W. French, probate judge of the said county of Yavapai, as provided in said act, filed a declaratory statement in said land office at Prescott for the entry of said south half of section 16, in accordance with the provisions of said act. That on July 28, 1889, when entry under said filing was attempted to be made by said probate judge, as aforesaid, appellant appeared in said local land office at Prescott, and filed her contest and protest to the allowance of said entry, and thereupon a hearing was had before said land officers, who decided in favor of the entry

by the probate judge and against the right of appellant to enter the same. That from said decision of said local land officers she took an appeal to the commissioner of the general land office, who affirmed the ruling of the said local land officers. That from said decision she appealed to the secretary of the interior, who sustained the ruling of the commissioner. That subsequently the land department issued a patent to said land, including the land held by appellant, to said probate judge, in trust for the occupants of said town of Flagstaff. That on the nineteenth day of February, 1891, the legislative assembly of the territory of Arizona created the county of Coconino from the said county of Yavapai, and that said town of Flagstaff is embraced within the new county. That appellee J. E. Jones was elected probate judge of the latter county, and by virtue thereof became the acting trustee of said townsite patent. There was a general demurrer interposed by the appellees to the sufficiency of the complaint, which was sustained by the court below, and a judgment entered for the appellees upon the demurrer.

The position assumed by the appellant upon the appeal from said judgment is, that the facts as stated by her in her complaint entitled her to the relief prayed for, for two reasons: First—That McMillan and Farriner having, prior to the survey of the land in the field settled upon, cultivated, and improved a portion of said section 16, and being upon the land at the time of said survey with a view to pre-empting the same, said section, or so much thereof as was included in their settlements, was at the time of the survey, and continued thereafter to be, subject to the right of pre-emption, and no title to the same by reason of section 2275 of the Revised Statutes of the United States was reserved to the territory for school purposes, but that by said section 2275 the right to this land became vested in her for the section or legal subdivisions thereof embracing the said settlements. Second—That the act of 1889 had no effect to change said lands from their character as public lands, so as to cut off or destroy the rights of settlers thereon to pre-empt the same. Section 1946 of the Revised Statutes of the United States provides that “sections numbered sixteen and thirty-six in each township of the territories of New Mexico, Utah, Colorado,

Dakota, Arizona, Idaho, Montana, and Wyoming shall be reserved for the purpose of being applied to schools in the several territories therein named, and in the states and territories hereafter to be erected out of the same." Said section 2275 reads as follows: "Where settlements with a view to pre-emption have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settlers, and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors." A cursory reading of these two sections, it seems to us, will disclose the purpose of Congress in reference to such settlers as may be found on sections 16 and 36 at the time of survey. This purpose is evidently to fix the *status* of such settlers as may prior to survey, without notice of the fact, have fixed their residence, with a view to pre-emption, on said sections, and to give such settlers the privilege of entering such lands under the pre-emption law, and obtaining title thereto; and for all such lands as may be patented to such pre-emptors, other lands, equal in quantity, are reserved to the territory or state for school purposes in lieu thereof. We think this privilege is limited by the language of section 2275, as well as by other provisions of the pre-emption laws, to such settlers as may be found on school lands at the time of the survey of the lands in the field. The right of pre-emption of such settlers as may have settled on school lands prior to survey being a personal privilege, it follows that sections 16 and 36 of each township are reserved to the territory or state for school purposes, subject only to the personal rights of such settlers to obtain title to the same under the pre-emption law; and, if they do not choose to assert their rights by filing and entering the land, or subsequently abandon their settlements, the land continues to be reserved to the state or territory for school purposes. It has been the uniform construction of the land department, in numerous decisions of the various secretaries of the interior since the law became operative, that the settler upon unsurveyed land which may upon survey be found to be a school section is the only person who can defeat the reser-

vation for school purposes. Counsel for appellant cites us two cases, decided by the supreme court of the United States, as supporting his view of the case,—those of *Sherman v. Buick*, 93 U. S. 209, and *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167. An examination of these will fail to show that they conflict in any wise with the views we have expressed above. In both the court construe the act of 1853, granting sections 16 and 36 in each township of land to the state of California for school purposes. Section 7 of the act of 1853 reads as follows: “That when any settlement by the erection of a dwelling-house or the cultivation of any portion of the land shall be made upon the sixteenth or thirty-sixth sections, before the same shall be surveyed, or when such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the state in lieu thereof.” It will be noted that the reading of this section of the act of 1853 differs materially from section 2275 of the Revised Statutes, and the interpretation of the former does not, therefore, construe the latter. In *Sherman v. Buick* the question was as to the relative rights of a settler before survey upon a school section, who had obtained a patent from the United States under a pre-emption claim, and one who had obtained a patent from the state to the same land. The court held that the state took no title to the land as against such settler, and that hence its patent was held to be void. In *Mining Co. v. Consolidated Mining Co.* the same question was presented, and the same decision arrived at, as in *Sherman v. Buick*. While section 7 of the act of 1853, quoted above, may be capable of the construction that it absolutely reserves from the grant of the state sections 16 and 36 in any township upon which settlements may be found at the time of survey, yet the supreme court, in the case of *Mining Co. v. Bugbey*, 96 U. S. 165, has declared that under said seventh section of the act of 1853 the settler is under no obligation to assert his claim, and, if he does not, and abandons his claim, the title of the state to such land becomes absolute as of the date of survey. In this case the settlers failed to assert any claim themselves to pre-emption, but sold their possessions and improvements after survey to the appellant. The right being personal, appellant therefore did not succeed to the rights of McMillan and Farriner to enter the land, nor

was the land, until the entry by the town of Flagstaff under the act of 1889, ever divested of its character as school land. In addition, section 2263 of the Revised Statutes forbids any assignment or transfer of the pre-emption right, and declares any such attempted assignment or transfer to be null and void. Under the view of the law we have expressed, it is unnecessary to consider what may be the effect of the act of 1889 upon the rights of the parties hereto. We think the demurrer was properly sustained, and the judgment will be affirmed.

Gooding, C. J., and Kibbey, J., concur.

[Civil No. 348. Filed January 28, 1893.]

[33 Pac. 589.]

GEORGE BRAVIN, Plaintiff and Appellant, v. THE MAYOR AND COMMON COUNCIL OF THE CITY OF TOMBSTONE, and FRANK RYAN, Chief of Police, Defendants and Appellees.

1. PLEADING—PARTIES—MISNOMER—CORPORATE NAME.—In an action against "The Mayor and Common Council of the City of Tombstone," a plea in abatement of the action, of misnomer of the corporation defendant, in that the corporate name is "The City of Tombstone, of the Territory of Arizona," and not "The Mayor," etc., as pleaded, is properly sustained.
2. SPECIAL LEGISLATION—ACT OF MARCH 16, 1891, VOID—IN CONFLICT WITH "HARRISON ACT" (REV. STATS. ARIZ. 1901, PAR. 63).—The Territorial Act of March 16, 1891, providing "that in all cities in which the total vote cast at the general election held therein on the fourth day of November, 1890, was less than six hundred," the functions of the city assessor, city tax-collector, city license-tax-collector, and street commissioner shall be incident, *ex officio*, to the office of chief of police, is special legislation and a violation of the Harrison Act, it appearing that Tombstone is the only city of that class, and that no provision is made whereby other cities may, in the future, come within its terms and operation.
3. SAME—CITIES—CLASSIFICATION.—To avoid objections as to legislation being special or local in character, the classification of municipalities

and the incidental imposition of different powers to them according to such classification, must be such that other municipalities may, upon the attainment of the conditions characterizing any particular class, enter that class, and the conditions themselves must be not only possible, but reasonably probable of attainment.

4. SAME—GENERAL LAWS—LEGISLATURE JUDGE WHEN APPLICABLE IN CASES NOT ENUMERATED—HARRISON ACT.—The Harrison Act enumerates certain subjects upon which there shall not be local or special legislation. It further provides that, “in all other cases where a general law can be made applicable, no special law shall be enacted.” The rule that the legislature is to be the judge of the applicability of a general law, not the courts, applies only to these “other cases,” not to those specifically enumerated.
5. OFFICE AND OFFICERS—USURPATION—DAMAGES—REV. STATS. ARIZ. 1887, PAR. 3195, CONSTRUED.—Under a statute providing that if judgment be rendered upon the right of any person to any office in his favor, he may recover the damages he shall have sustained by reason of the usurpation of the office by the defendant, it is error to sustain the special demurrer of the incumbent of any office holding under a void act of the legislature to that part of the complaint for the recovery of the office which alleges damages.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge. Affirmed in part. Reversed in part.

The facts are stated in the opinion.

Barnes & Clark, for Appellant.

The court takes judicial notice of the fact that this act applies only to Tombstone. *Devine v. Commissioners of Cook County*, 84 Ill. 592.

On its face it is apparent that this act is most artfully drawn, to the end that while it appears to be general it shall in fact affect but one city. Such legislation is clearly void, and is prohibited by the Harrison Act (Rev. Stats. Ariz. 1887, p. 36) which says that legislatures “shall not pass local or special laws, incorporating cities, towns, or villages, or changing or amending the charters of any town, city, or village.”

Outside of the Harrison Act, it has been held that a special act of the legislature cannot be altered, changed, or amended by a general law. *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455; *State v. Miles*, 34 N. J. L. 177.

If the law be general, then it does not change or alter the special acts creating the city of Tombstone and enacting its charter. Laws of 1881, p. 37; Laws of 1885, p. 315.

If it be not a general law, then it is a special act, and is prohibited. But we contend this is changing a special act. Its title clearly indicates it. Its terms say it shall apply only to cities which at a date in the past cast at a certain election six hundred votes.

The court knows that but one city in Arizona is included, and it was so drawn as to carefully exclude every other city. The exact number of votes—viz., six hundred—was selected so as to designate the city of Tombstone and no other. This is not classification based upon population, which may also embrace other cities, or may embrace one city to-day and others to-morrow, which has been upheld, or any other basis of classification by which it is apparent that all cities of a class were intended to be embraced in the act. This act is on its face intended to exclude all but one city, and is artfully drawn to that end. This is a mere evasion of the prohibitions of the Harrison Act; and whenever this appears the court will not hesitate to pronounce the act void. *Devine v. Commissioners of Cook County*, 84 Ill. 592; *Potwin v. Johnson*, 103 Ill. 70; *Holmes v. Mattoon*, 111 Ill. 27, 53 Am. Rep. 602. See, also, in the American Law Review, May-June, 1888, p. 403, an article by J. R. Berryman which treats exhaustively this subject.

The test of the latest cases is: A law which applies to a class in which others may enter by increase is not special, but general, if the grade of any particular city be not designated by the act, but depends upon the growth, as by growth it may pass from one grade or class into another. If the act apply to a city having at the last census a designated number of inhabitants and no more, it is void. Am. Law Rev. 1888, p. 413; *State v. Anderson*, 44 Ohio St. 247, 6 N. E. 571.

In Pennsylvania classification by population alone is recognized. *Davis v. Clark*, 106 Pa. St. 377; *Scranton v. Silkman*, 113 Pa. St. 199, 6 Atl. 146; *Commonwealth v. Patum*, 88 Pa. St. 256.

New Jersey holds, "Classification must provide for the future. If it be limited to existing conditions, it will be void." *Pavonia R. Co. v. Jersey City*, 45 N. J. L. 297; *Cout-*

teri v. New Brunswick, 44 N. J. L. 45; *Ziegler v. Gaddis*, 44 N. J. L. 363; *Van Giesen v. Bloomfield*, 47 N. J. L. 442, 2 Atl. 249; *Gibbs v. Morgan*, 39 N. J. Eq. 126.

Kansas recognizes classification by population only. *Topeka v. Gillette*, 32 Kan. 431, 43 Pac. 800.

Missouri holds the same; that if others may not come in, it is special legislation. *Ewing v. Hoblittelle*, 33 Mo. 73. See, also, *People v. Cooper*, 83 Ill. 590; Sutherland on Statutory Construction, secs. 127, 128, 129.

William Herring, for Appellees.

The plea, demurrer, and objection of defendants, to the effect that the action was not brought against the city of Tombstone in its corporate capacity, were properly sustained.

The corporation must be sued in its corporate name, and not in the name of its officers. City Charter Laws of 1881, p. 37; Dillon on Municipal Corporations, sec. 118; *Young v. Barder*, 90 N. C. 424; Rev. Stats. Ariz., par. 677.

The special demurrer in relation to the inability of plaintiff to recover damages in an action of ouster was properly sustained. The action was for usurpation of office. In such case no action for damages lies until a judgment is rendered in favor of the person who alleges the right. Rev. Stats. Ariz., par. 3195.

The classification by population is constitutional. *Iowa Mining Co. v. Bonanza Mining Co.*, 16 Nev. 74; *Solen v. Virginia etc. R. R. Co.*, 15 Nev. 332; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413.

The case of *Fellows v. Walker*, 39 Fed. 651, was an instance where there was but one city in the state of Ohio in that class.

An act providing for public weighers in certain cities according to the amount of cotton shipped was held valid. *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321.

Where a statute is general in its terms, and its sole effect is in some degree to remove the differences existing in the various regulations of internal affairs of towns or counties, and to subject those affairs to the operation of a general law, then the statute is not special or local in the constitutional sense, although the pre-existing legal conditions were such that it would effect a change in one town or county. *State*

v. *Govern*, 47 N. J. L. 368; *Gould v. Bourgeois*, 51 N. J. L. 368, 18 Atl. 64.

This is a case provided for in the Harrison Act. It is a case where a general law could not be made applicable, and if special legislation, then it is within the rule laid down by Dillon (vol. 1, sec. 26, p. 134).

Whether a general law can be made applicable is a question for the legislature exclusively. *Estate of Sticknoth*, 7 Nev. 223; *People v. Allen*, 42 N. Y. 378; *State v. Hitchcock*, 1 Kan. 173, 81 Am. Dec. 503; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455.

KIBBEY, J.—The appellant (the plaintiff below) alleged in his complaint that he had been duly elected to the office of assessor of the city of Tombstone, and became *ex officio* tax and license-collector, health officer, and street commissioner of that city, and, having duly qualified, was duly inducted into that office; that on the first day of April, 1891, the defendants the mayor and common council of the city of Tombstone illegally and wrongfully usurped said offices, and took possession thereof, and of the books, papers, and other effects pertaining thereto, and turned them over to the defendant Frank Ryan, chief of police of the city of Tombstone; that Ryan thereupon entered upon the discharge of the duties, and the exercise of the powers, of appellant's office, and continues therein, and has thereby defrauded appellant of the emoluments of the office. Appellant prays for judgment of ouster against Ryan; that he may be readmitted into office; and that he have judgment for two hundred dollars damages. The defendants appeared, and the mayor, etc., pleaded, in abatement of the action, misnomer of the corporation defendant, in that the corporate name is "The City of Tombstone of the Territory of Arizona," and not "The Mayor," etc., as pleaded. The defendants demurred specially and generally, and pleaded a general denial. The plea in abatement was sustained, and the action as to the mayor, etc., dismissed. The record from this point in the proceeding is much confused. The minute entry of the proceedings states, after reciting the ruling on the plea in abatement: "And said argument further proceeding upon the demurrer filed herein, the same being submitted as to the special demurrer upon the

claim for damages made in said complaint, and the court, being now fully advised in the premises, does sustain the same, and grants leave to argue the remaining questions raised by demurrer." The next entry in the minutes, dated more than two months later than the foregoing, recites: "This cause having heretofore been tried and submitted to the court, and the court, now being fully advised herein, does find the issue herein in favor of the defendants, and against the plaintiff, and does hereby order judgment accordingly, and for costs. Plaintiff, by his counsel, moves for a new trial, which is overruled. Thereupon, plaintiff gives notice of appeal," etc. The judgment appears in the record here, and recites that "no witnesses were examined." The words in the printed blank, "the evidence being included," are obliterated, and the judgment begins: "Wherefore, by reason of the law aforesaid, it is ordered, adjudged," etc., ——— "do have judgment against the plaintiff on all the issues in said case." No attempt is made to perfect an appeal from any judgment upon the facts. While the record is informal, we are of the opinion that no issue of fact was tried, and that the judgment is upon an issue of law only.

The appellant assigns as error the ruling of the court in sustaining the demurrer to the complaint, and we think that question is substantially presented here. We may premise that the plea in abatement was properly sustained, and we need not consider any question on the demurrer of the mayor, etc., for that ruling carried them out of court.

The city of Tombstone was created by a special act of the general assembly in 1881. That act provided for a city assessor, who should be *ex officio* tax and license collector, health officer, and street commissioner. Appellant was duly elected to that office, and had legally entered upon the discharge of the various duties incident to the office. This is admitted by the demurrer. It was subsequently provided by "An act to reduce expenses in certain cities of the territory of Arizona," approved March 16, 1891, "that in all cities . . . in which the total vote cast at the general election held therein on the fourth day of November, 1890, was less than six hundred," the functions of the city assessor, city tax-collector, city license-tax-collector, and street commissioner shall be incident, *ex officio*, to the office of chief of

police. In pursuance of this act of 1891 the discharge of the duties theretofore imposed upon the appellant, as city assessor, were devolved upon Ryan, the appellee, chief of police; and he thereafter discharged them, to the exclusion of appellant. At the general election of 1890, Tombstone was the only city in Arizona in which there were less than six hundred votes cast. Appellant contends that the legislative act of 1891 is in violation of the inhibition contained in the act of Congress approved July 30, 1886, commonly known as the "Harrison Act," which, among other things, provides that the "legislatures of the territories . . . shall not pass local or special laws in any of the following enumerated cases: . . . incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village." Constitutional provisions similar to that of the Harrison Act, just quoted, have frequently been the subject of judicial construction. We entertain no doubt but that if the Territorial Act of 1891 is valid it operates as an amendment of the charter of the city of Tombstone. Is it "local or special," within the meaning of the Harrison Act? The law can never apply to any other city in Arizona. It applies only to cities that in 1890 cast less than six hundred votes. Of that class Tombstone is the only one. No provision is made in the act whereby other cities may in future come within its terms and operation. In fact, others are necessarily excluded. Sutherland, in his work on Statutory Construction, says: "If a statute is plainly intended for a particular case, and looks to no broader application in the future, it is special or local, and if such laws are prohibited it is unconstitutional." Sec. 129. A classification of cities may be made, based upon population; upon the number of votes cast from time to time; upon the extent or character of a particular business or industry done and pursued within their limits, etc. And this even though but one city in the state or territory comes within the provisions of the statute at the time of its enactment. But the statute must be elastic, so that other cities may, as they attain the requisite conditions, come within the classification and within the operation of the statute. We think the rule may safely be stated to be that the classification of municipalities, and the incidental imposition of different obligations and granting of different powers to them

according to such classification, must be such that other municipalities may, upon the attainment of the conditions characterizing any particular class, enter that class, and the conditions themselves must be not only possible, but reasonably probable, of attainment. Am. Law Rev., sec. 22, p. 403, and cases there cited. Applying this rule to the case at bar, we think the act of 1891 does not come within it. It is therefore special legislation, and a violation of the Harrison Act. It is suggested by appellee that this is a case to which general legislation could not be made applicable, and that the legislature, and not the courts, is the sole judge of that fact. That rule applies only to subjects of legislation not specifically enumerated. The statute (Harrison Act) enumerates certain subjects upon which there shall not be local or special legislation. It further provides that, "in all other cases where a general law can be made applicable, no special law shall be enacted." It is to these "other cases" that the rule laid down by some courts, that the legislature is to be the judge of the applicability of a general law, applies.

Our statute provides that if judgment be rendered upon the right of a person to any office in his favor, he may recover the damages he shall have sustained by reason of the usurpation of the office by the defendant. The court, therefore, erred in sustaining appellee Ryan's special demurrer to that part of the complaint claiming damages. The judgment of the court below, as to the mayor and common council, etc., is affirmed, and as to Ryan it is reversed, and the cause is remanded for trial in accordance with this opinion.

Gooding, C. J., and Wells, J., concur.

[Criminal No. 65. Filed January 28, 1893.]

[33 Pac. 869.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
LYMAN FOLLETT et al., Defendants and Appellants.**

1. WITNESSES—CREDIBILITY—FALSE TESTIMONY AS TO MATERIAL FACT.

—An instruction that if the jury find that any witness has sworn falsely on any material fact, they have the right to disregard his whole testimony, unless corroborated, is erroneous. This rule only applies in case the witness has knowingly and willfully sworn falsely.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Graham. Richard E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

W. H. Barnes, and F. J. Heney, for Appellants.

The court erred in giving instruction numbered eight. This instruction tells the jury that if any witness has sworn falsely as to any material fact they may disregard him entirely. This is not the law. He must willfully swear falsely. The maxim, *Falsus in uno, falsus in omnibus*, only applies to willful falsity. *McClure v. Williams*, 65 Ill. 392; *Pope v. Dodson*, 58 Ill. 365. In this case the judgment was reversed upon an instruction exactly like the one at bar, and it was a civil case. *United States Ex. Co. v. Hutchinson*, 58 Ill. 44; *Swan v. People*, 98 Ill. 612; *Blitt v. Heinrich*, 33 Mo. App. 243; *The Santissima Trinidad*, 7 Wheat. 339; *Hillman v. Schwenk*, 68 Mich. 293, 36 N. W. 77; *Barney v. Dudley*, 40 Kan. 247, 19 Pac. 550.

William Herring, Attorney-General, for Respondent.

GOODING, C. J.—In this case the trial court gave the following instruction: “In considering the question of guilt or innocence the jury had the right, and it is its duty, to examine carefully into the credibility of the witnesses; and in investigating the question of credibility the jury has a right to take into consideration the motives of witnesses so far as

the position or testimony of a witness discloses any motive, and if the jury finds that any witness has sworn falsely on a material fact they have the right to disregard his whole testimony, except so far as the testimony of such witness be corroborated by other credible evidence in the case.” The maxim, *Falsus in uno, falsus in omnibus*, applies only in case the witness has knowingly and willfully sworn falsely. The instruction, as given, we think was erroneous. The judgment should be reversed. *Pope v. Dodson*, 58 Ill. 365; *McClure v. Williams*, 65 Ill. 392; *Barney v. Dudley*, 40 Kan. 247, 19 Pac. 550; *Hillman v. Schwenk*, 68 Mich. 293, 36 N. W. 77; *Railroad Co. v. Hack*, 66 Ill. 243.

Kibbey, J., concurs specially.

[Civil No. 351. Filed January 28, 1893.]

[77 Pac. 617.]

CHARLES R. WORES, Defendant and Appellant, v. A. J. PRESTON, Plaintiff and Appellee.

1. APPEAL AND ERROR—APPEAL HOW PERFECTED—FILING BOND BEFORE RULING UPON MOTION FOR NEW TRIAL, BUT AFTER JUDGMENT, DOES NOT AFFECT RIGHT OF APPEAL.—An appeal is perfected under our code upon the concurrence of two acts,—viz., giving notice of appeal and filing an appeal-bond. Where an appeal-bond is filed after entry of judgment, but before the action of the court upon a motion for a new trial, and notice of appeal is given after the motion had been overruled, the appeal was properly perfected.
2. SAME—JURY—WANT OF UNANIMITY—BILL OF EXCEPTIONS—GROUND FOR NEW TRIAL—WAIVER OF ERROR—TRANSCRIPT ON APPEAL—CONTRADICTION IN RECORD.—Where error is assigned upon the ground that the verdict of the jury is void because concurred in by ten jurors only, and the record, being a transcript of the clerk's minutes, shows in one place that the verdict was signed by the foreman only and concurred in by the other jurors, and in another that the verdict was signed not only by the foreman but by nine others of the jury, this court cannot say that one part of the record imports verity more than the other, and appellant having failed to object to its receipt and to preserve its want of unanimity in

the bill of exceptions, and to make the receipt of the imperfect verdict a ground for a motion for new trial, will be held to have waived the objection.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Affirmed.

Owen T. Rouse, for Appellant.

W. M. Lovell, for Appellee.

KIBBEY, J.—Appellee moved to dismiss this appeal because the appeal-bond was filed before the trial court ruled upon appellant's motion for a new trial.

We think that fact cannot affect the right of appeal. An appeal is perfected under our code upon the concurrence of two acts—viz., giving notice of appeal and filing an appeal-bond.

In this case the appeal-bond was filed after the entry of the judgment but before the action of the court upon the motion for a new trial: the notice of appeal was given after the motion for a new trial had been overruled. The appeal was therefore properly perfected, and the motion to dismiss is accordingly denied.

Appellee sued appellant for \$335, the purchase price for 74,455 pounds of silver and gold ore alleged to have been sold and delivered by appellee to appellant.

Appellant alleged that the contract of purchase was conditional, being dependent upon the ore assaying not less than thirty-eight ounces of silver per ton; that he was induced to make the purchase upon the representation of the appellee that the ore would assay not less than thirty-eight ounces of silver per ton; that, relying upon that representation, he hauled the ore from the dump of the Blue Jay Mine, thirty miles distant from Tucson, to that place, where he ascertained that it would not average over twenty-seven ounces of silver per ton; that ore running less than thirty-eight ounces was valueless to him, and there was a resultant damage to him accruing from the cost of hauling the ore, etc., of \$246.08, for which he demanded judgment against the appellee.

There was a trial by jury, and verdict for the plaintiff for the sum demanded in the complaint.

There was a motion for a new trial,—a bill of exceptions, and a statement of facts.

The errors assigned are that the verdict of the jury is void because concurred in by ten jurors only; that the court erred in excluding certain evidence offered by appellant, and in admitting certain evidence offered by appellee at the trial; and that the verdict is contrary to the evidence.

The want of unanimity of the jury in the verdict was not made a ground of the motion for a new trial. No objection was made to the receipt of the verdict at the time, and it does not appear in the record as a matter of fact that the verdict was not unanimous.

The minute entry of the clerk recites that the jury came into court in charge of the bailiff, and, their names being called, all (12) answered thereto, and being asked if they had agreed upon a verdict replied through their foreman that they had, and that then the foreman presented a verdict, which was for the plaintiff, and signed by the foreman only, that the jury, being interrogated by the clerk, "say that is their verdict, and so say they all." In another part of the record the verdict appears signed not only by the foreman but by nine others of the jury. We cannot say that one part of the record, both being transcripts of the clerk's minutes, imports verity more than the other. If appellant wished to save this question,—if in fact the verdict was not a unanimous one,—he should at the time have objected to its receipt and preserved the fact of its want of unanimity in the bill of exceptions, and made the receipt of the imperfect verdict a ground for a motion for a new trial. By failing to have done so, he has waived the objection.

The court did not err, so far as we can gather from the record, in excluding evidence offered by the appellant. The bill of exceptions does not disclose the facts proposed to be proved by the rejected evidence, and its relevancy is not disclosed by the questions propounded. The evidence admitted over appellant's objection was immaterial, but in no wise prejudiced appellant. The evidence in the case amply sustains the verdict.

The judgment is affirmed.

[Criminal No. 77. Filed April 8, 1893.]

In the Matter of the Application of J. J. SMITH for a Writ of Habeas Corpus v. TERRITORY OF ARIZONA, Respondent.

1. **ROBBERY—DEFINED—REV. STATS. 1887; PENAL CODE, PAR. 319; LAWS 1889, ACT NO. 2, APPROVED FEBRUARY 28, 1889, CITED, AND LATTER HELD NOT TO REPEAL FORMER.**—The act of 1889 did not repeal paragraph 319 of the Penal Code. It merely defines a new and additional offense.
2. **APPEAL—VERDICT CONTRARY TO EVIDENCE—MUST BE TAKEN ADVANTAGE OF BY APPEAL.**—If the jury found the applicant guilty of the offense charged upon evidence that would have warranted a conviction for another offense, their verdict was contrary to the evidence and erroneous, and the matter should have been presented by appeal.
3. **HABEAS CORPUS—NOT PROPER FOR REVIEW OF ERRORS NOT GOING TO JURISDICTION.**—We cannot review the record upon an application for a writ of *habeas corpus* to correct mere errors that do not go to the jurisdiction of the court over the offense or the person.

ORIGINAL APPLICATION in supreme court.

Stewart & Doe, for Applicant.

Francis J. Heney, Attorney-General, for Respondent.

KIBBEY, J.—It is alleged in the petition that the applicant was indicted, tried, and convicted in the district court of Yavapai County for the crime of robbery, and was sentenced therefor to the territorial prison, where he is now confined; that the evidence at the trial showed that the offense, if any, was committed by means of a willful and malicious assault upon a railroad train with an intent to commit robbery.

The indictment charged the crime of robbery, which is defined in section 319 of the Penal Code as follows: "Robbery is the felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear."

The offense was alleged to have been committed on the twentieth day of March, 1889. By act of February 28, 1889,

it is provided (etc.) "that whoever willfully makes an assault upon a railroad train . . . for the purpose and intent to commit . . . robbery . . . is punishable with death."

The applicant urges that the act of 1889 repealed section 319 of the Penal Code, before quoted, and that therefore the court had no jurisdiction of the offense charged.

We do not think the act of 1889 repealed section 319. It merely defines a new and additional offense. If the jury found the applicant guilty of the offense charged upon evidence that would have warranted a conviction for another offense, and not the one charged in the indictment, their verdict was contrary to the evidence, and therefore erroneous, and the matter should have been presented to us by appeal.

We cannot review the record upon an application for a writ of *habeas corpus* to correct mere errors that do not go to the jurisdiction of the court over the offense or the person charged with it.

The petition is denied, all the judges concurring, and the applicant is remanded to the custody of the proper officer.

[Civil No. 368. Filed April 8, 1893.]

[33 Pac. 590.]

ARIZONA LUMBER AND TIMBER COMPANY, Defendant and Appellant, v. WILLIAM MOONEY, Plaintiff and Appellee.

1. MASTER AND SERVANT—HAZARDOUS EMPLOYMENT—SERVANT KNOWN TO BE INEXPERIENCED—MASTER'S DUTY TO INSTRUCT—NEGLIGENCE.—When the employment is hazardous and dangerous, requiring some skill and experience to properly guard against accident and consequent injuries, it is the duty of the master, if the servant be known to be, through youth, inexperience, or want of capacity, ignorant of the dangers, and the proper manner of doing his work so as to avoid them, to see to it that this servant be informed of the risks he assumes, and properly instructed, so that he may be able to do his work in such a way that he may be as safe against accident as proper care on his part may insure. If the master fail in this duty, it is, in law, negligence.
2. SAME—SAME—INEXPERIENCED SERVANT—ASSUMED RISK—PRESUMPTION.—An employee who is shown to be inexperienced in the use

of machinery of the kind he is set to work with will not be presumed, in absence of proof to the contrary, to comprehend and to contract to assume such dangers as are incident thereto as may not, to a person of his age and general capacity, be apparent and obvious.

3. APPEAL AND ERROR—EVIDENCE—ERROR IN INTRODUCTION AND EXCLUSION OF—MUST BE EMBODIED IN MOTION FOR NEW TRIAL.—When assignments of error, based upon the rulings of the trial court relative to the introduction and exclusion of evidence, were not mentioned in the motion for new trial, they cannot be considered on appeal.

Reversed on rehearing. *Post*.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Edmund W. Wells, Judge. Affirmed.

The facts are stated in the opinion.

Norris & Ellinwood, for Appellant.

The court erred in permitting plaintiff to testify, over the objection of defendant, that he had never received any instructions from the defendant regarding the character of the work in which he was employed, as to its being dangerous or unsafe, nor any instructions as to how he should run the saw in question nor any of the machinery in the mill.

It does not appear that he did not know how to run the machine, nor that it was from a lack of such knowledge that he was injured. And the testimony that he had never received any instructions how to run it was irrelevant, and its admission error.

Deciding the case of *Stephenson v. Duncan*, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337, Cole, C. J., said: "When the plaintiff entered upon his employment of operating the machinery and shingle-mill owned by the defendant, the unsafe condition of such shingle-mill, the fact that the saw was not covered, and that it projected over its frame partly across the narrow passageway along which he was obliged to go in tightening and loosening the belt, were all matters presumably within his knowledge. The condition of the passageway and the relation of the saw to it, if unsafe and dangerous, would be seen and comprehended by a person of

common intelligence, and the plaintiff assumed the risk incident to the service when he undertook the employment.”

Where the dangers of the employment are visible and apparent to one of ordinary intelligence, there is no duty on the part of the employer to warn an employee thereof. *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 283; *Johnson v. Ashland Water Co.*, 77 Wis. 51, 45 N. W. 807; 14 Am. & Eng. Ency. of Law, 900; *Prentiss v. Kent Manufacturing Co.*, 63 Mich. 478, 30 N. W. 109; *Bond v. Smith*, 14 N. Y. Supp. 932, 39 Am. St. Rep. 124.

Even if defendant's *duty* to warn was established, and his negligent *failure* to warn was established, still there would be a third indispensable step to be taken, and that is, that such failure to warn *caused* the injury complained of.

Stewart & Doe, for Appellee.

SLOAN, J.—Appellee brought suit in the district court, Coconino County, against appellant, to recover damages for personal injuries sustained by him while in the employ of appellant, which said injuries are alleged to have been caused by the negligence of the latter. There was a verdict and judgment for appellee for thirty-five hundred dollars, and the appellant brings this appeal from said judgment, and from the order overruling the motion for a new trial. It is alleged in the complaint, in substance, that the Arizona Lumber and Timber Company, appellant, was on the eighth day of October, 1890, the owner of and engaged in operating a saw and planing mill in said county; that a part of the machinery in use in said mill on said date was a certain circular saw used for ripping boards, commonly called a “resaw”; that this saw was unsafe, defective, unguarded, and dangerous, and known to be such by appellant; that prior to said date appellee had been employed by appellant to work in and about said mill as a common or unskilled laborer; that on said date appellee, by direction of appellant, was engaged in assisting in the operation of said circular saw, his immediate duty being to place lumber in position to be cut by said saw; that at the time appellee was inexperienced in the use of said saw and the machinery connected therewith, and ignorant of the dangerous character and condition thereof; that all this

was at the time well known to appellant, both as to the dangerous character and condition of said saw, as well as appellee's inexperience and want of knowledge of the use and proper management of the same, but, nevertheless, appellant, in breach of its duty to appellee, negligently refrained from informing him as to the dangerous character and condition of the said machinery, as well as to instruct him as to the proper manner of operating the same; that by reason of said neglect and the unsafe and dangerous condition of said machinery, appellee, while engaged in operating the same on said date, as aforesaid, was struck by a piece of board thrown off said saw, thereby losing an eye, and becoming permanently disfigured.

It is shown by the evidence that at the time appellee received the injuries complained of he was in the employ of the appellant, at work in the planing-mill, which work consisted in "feeding lumber," as it is called, to a machine known as a "resaw." This machine is intended to split boards into thin pieces, and consists of a circular saw about forty-one inches in diameter, set in an iron frame. When operated, this saw makes from one thousand to one thousand two hundred revolutions per minute. In front of this saw are placed a double set of upright rollers, which revolve inwardly and towards the saw. In front of these is a horizontal roller, which revolves in the direction of the upright rollers. On each side of this saw, and a little above its axle, is a slide or table, which carries the boards as they are sawed, and upon which they rest until they are taken off by the attendant behind the machine. The manner of operating the machine is, in general, this: The feeder standing in front of the saw places the end of the piece of lumber to be split with the edge upon the horizontal roller, when it is caught by the upright rollers, and drawn by them towards the saw. It is intended that boards to be split shall enter the rollers in a horizontal position, on a level with the top of the tables on each side of the saw. When the board is sawed, the two pieces thus made are taken off from behind, to make room for the next. This accident was shown to have occurred in this way: Appellee, in feeding the machine, placed a piece of lumber between the rollers with the far end about four or five inches lower than the end towards the saw; that when

it was caught by the saw the front end was drawn downward until the split pieces rested on the edge of the tables back of the saw. The back end was held high up by the rollers until released by them, when the sawed pieces fell upon the tables. One of them rebounded and fell upon the top of the saw, which, cutting off a piece several feet long and several inches wide, hurled it forward, striking appellee in the face, and causing the injuries complained of.

The principal assignment of error relied upon by the appellant is, that the evidence is clearly insufficient to establish any negligence on its part for which appellee can recover. Counsel for appellant, in their brief, discuss the case upon the theory that, unless the evidence discloses that appellant was negligent in allowing appellee, without previous warning, to work with a machine so defective in its structure or so incomplete in the safeguards with which it should have been supplied as to render it unsafe and dangerous there can be no recovery in this action. Testimony was introduced by appellee and counter testimony by appellant as to whether or not the resaw was defective, in not having some sort of a guard to protect the feeder from pieces of timber which might be thrown off when running. This question, however, was virtually taken from the jury by the court in its instruction to the effect that the absence of such a guard, if a defect, was such a visible, open, and apparent one that appellee in consenting to operate the saw was to be presumed to have had a knowledge of such defect and to have assumed the dangers incident thereto. The pleadings and evidence present, however, an entirely different question, which we will proceed to consider.

It is, we think, apparent from the evidence that the immediate cause of the accident to appellee was his want of skill in feeding the saw. Two or three days prior to the accident appellee had been set at this work by direction of the foreman of the mill. He testified—and his testimony upon this point is uncontradicted—that at the time he had but little knowledge of the machine, and no experience in the kind of work required in its operation. He had been prior to this time employed by appellant as a common laborer about the lumber yard and mill, and was not a skilled workman. It also appears that he was not warned as to the dangers inci-

dent to the work, nor instructed as to how the lumber should be put into the machine so as to avoid those dangers. The rule of law generally applicable as between employer and employee is, that the latter takes upon himself the usual and ordinary risks incident to such employment. The employer, unless he has knowledge to the contrary, has a right to presume that the employee is competent to perform the work and has an intelligent appreciation of its dangers. A different rule, however, prevails when the employment is a hazardous and dangerous one, requiring some degree of skill and experience to properly guard against accidents and consequent injuries, as when the employment consists in operating a dangerous piece of machinery. In such a case it is the duty of the master, if the servant be known to be, through youth, inexperience, or want of capacity, ignorant of the dangers and the proper manner of doing his work so as to avoid them, to see to it that this servant be informed of the risks he assumes and properly instructed, so that he may be able to do his work in such a way that he may be as safe against accident as proper care on his part may insure. If he fail in this duty, it is, in law, negligence. *Jones v. Mining Co.*, 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207; *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 307. An employee who is shown to be inexperienced in the use of machinery of the kind he is set at work with will not be presumed in the absence of proof to the contrary to comprehend and to contract to assume such dangers as are incident thereto as may not to a person of his age and general capacity be apparent and obvious. *Swoboda v. Ward*, 40 Mich. 423; *Coombs v. Cordage Co.*, 102 Mass. 572, 3 Am. Rep. 506. Under the law as we have stated it, and under the pleadings, the verdict of the jury is justified if in this case the following facts were shown to exist: 1. That appellee at time of receiving his injuries was inexperienced in the use of the resaw and the proper method of feeding the same; 2. That the accident occurred by reason of appellee's inexperience, and not by reason of want of such care and attention to his work which one of his experience, age, and general capacity might be expected to know was necessary to his safety; 3. That appellant knew at the time appellee went to work that the latter was inexperienced in the use of the resaw; 4. That

appellant neglected to inform appellee of the dangers and risks he was assuming and to instruct him as to the proper manner of doing that work, so as to avoid such accidents as befell him. However we might view the preponderance of the evidence as to these points, there is testimony tending to establish them, and, the jury having found them to exist, we do not feel it our duty to disturb their verdict.

There was a large number of assignments of error made by appellant based upon the rulings of the court during the trial relative to the introduction and exclusion of evidence, but as none of them were mentioned in the motion for a new trial we cannot consider them. We have carefully considered the instructions, and find that appellant has not just reason to complain of them. They fully state the law governing the case, and if some of them be subject to criticism it is not for the reason that they contain harmful error. We think the judgment should be affirmed, and it is so ordered.

Gooding, C. J., and Kibbey, J., concur.

[Civil No. 357. Filed April 15, 1893.]

[33 Pac. 823.]

THE CITY OF TOMBSTONE OF THE TERRITORY OF
ARIZONA, Defendant and Appellant, v. JAMES
REILLY, Plaintiff and Appellee.

1. APPEAL AND ERROR—RECORD—STATEMENT OF FACTS—STIPULATION—
REV. STATS. ARIZ. 1887, PAR. 843, CONSTRUED.—Paragraph 843,
supra, requires that a statement of facts on appeal shall be submitted to the trial judge for his approval and signature, even when agreed to by the parties or their counsel. A stipulation by the parties that such a statement of facts was submitted to the judge, found correct, and signed by him, cannot take away the right, nor make it any the less the duty of the judge, under the statute, to approve and sign the statement, and wanting such approval and signature, it cannot be considered a part of the record.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Allen R. English, for Appellant.

James Reilly, *in pro per*.

WELLS, J.—As appears from the record the bill of exceptions was not allowed by the judge of the court, as required by paragraph 828 of the Revised Statutes. Nor is there any statement of facts approved and signed by the judge. There is a stipulation by the parties “that the statement of facts herein shown to have been agreed to by respective counsel was thereafter settled, found correct, and signed as such by the judge, and by him approved, as prescribed by paragraph 843.” Paragraph 843 provides that if the parties or their attorneys agree upon a statement of facts they shall sign the same, and it shall be submitted to the judge, who shall, if he finds it correct, approve and sign it. True, the parties or their attorneys may agree what the facts are as proved upon the trial; but when that is done it is still essential that the statement should be submitted to the judge for his examination, approval, and signature. If the agreement or stipulation of the parties or their counsel is all that is required, why impose upon the judge the task of ascertaining its correctness before approving and signing it? The trial court is so far interested in the matter that it should see the record presents to the supreme court the case as tried in the court below. The stipulation may, through inadvertence or otherwise, present a case upon an entirely different theory from the one on which it was tried, or may present an entirely different record from the one made below, and it is due to the court and to the parties to the action that the statement of facts be a correct one, and that he have an opportunity of examining it to ascertain if it is correct. The statutes require that the statement of facts shall be submitted to him, even when agreed to by the parties or their counsel. The purported statement of facts in this case was not submitted to the judge, and he had no opportunity to examine it to ascertain its correctness. The parties stipulating that it was found correct and signed does not make it so, when in fact the statement was neither submitted to the judge nor approved or signed by him. No agreement of counsel can take away the

right, nor make it any less the duty, of the judge, under the statute, to approve and sign the statement, before it becomes a part of this record. It is entitled to become a part of the record only by virtue of the allowance and signature of the judge, and if these are wanting in any agreed statement attempted to be made and filed under the statute it must be rejected as improperly in the record. *Smith v. Blackmore*, 3 Ariz. 348, 29 Pac. 15. The purported statement of facts is therefore not considered as a part of the record. There appearing no error in the judgment-roll, the judgment of the lower court is affirmed.

Gooding, C. J., and Kibbey, J., concur.

[Civil No. 256. Filed April 15, 1893.]

[33 Pac. 944.]

THE SANTA RITA LAND AND MINING COMPANY,
Plaintiff and Appellant, v. T. LILLIE MERCER, De-
fendant and Appellee.

1. MEXICAN GRANTS—EJECTMENT—UNCONFIRMED GRANT WILL NOT SUPPORT—ASTIAZARAN v. SANTA RITA ETC. MINING Co., 148 U. S. 80, 13 SUP. CT. REP. 457, FOLLOWED.—Title resting upon a Mexican grant, favorably reported upon by the surveyor-general, but not as yet acted upon by Congress, will not support an action of ejectment. *Astiazaran v. Santa Rita etc. Mining Co.*, *supra*, followed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Affirmed.

Haynes & Mitchell, for Appellant.

One entering upon a portion of a large tract of land under a deed from one having title to the whole, which describes the whole by metes and bounds, may maintain ejectment against a mere intruder who enters upon or who unlawfully withholds possession of any portion of the premises described in such deed, without proof of a *pedis possessio* of the part with-

held. *Prescott v. Nevers*, 4 Mason, 326, Fed. Cas. No. 11,390, 21 Myer's Fed. Dec., sec. 3722; *Clark v. Courtney*, 5 Pet. 319, 354; *Ellicott v. Pearl*, 10 Pet. 552; *Brobst v. Brock*, 10 Wall. 531; *Unger v. Mooney*, 63 Cal. 593, 49 Am. Rep. 100. The treaty entered into at the time of the Gadsen Purchase does not provide that any kind of a grant "shall be ratified and confirmed," but it does provide that "property of every kind shall be inviolably respected," except certain kinds of grants. The effect of the general guarantee was before the supreme court of California in an early case, the grant being one of the class excepted in the Gadsen Treaty, and Field, J., uses this language:—

"Under the former government, Sutter was entitled to the possession of his land under his grant; indeed, the conditions of occupation or cultivation attached to it. To avoid a denouncement and a possible forfeiture of his estate, he was required to cultivate or occupy the land, and its possession was his right, which could have been enforced under the Mexican government. It was the right to the use and enjoyment of property, and as such was guaranteed by the stipulation of the treaty. It accompanied his grant, and, like any other right of property, may be enforced in our courts. The grant conveying, as we have seen, the title carries with it the right of use, possession, and enjoyment of the land, until, by the appropriate action of the general government, the estate of the grantee is defeated, admitting that it is competent for the government to provide for defeating it. It follows that the action of ejectment will lie directly upon the grant to recover the land, or any portion thereof, embraced within its boundaries." *Ferris v. Coover*, 10 Cal. 621. This case is of particular force because the grant was of the usual eleven leagues within much larger boundaries, but the court held, not that the grantee must wait until the exact boundaries of his claim had been ascertained, but that he could maintain ejectment for the larger tract or any part of it until the government had set apart his eleven leagues. Judge Field, speaking of the same grant in a later case, said: "Indeed, it is a matter of surprise that there ever was any serious question as to the right of Sutter (the grantee), or those claiming under him, to recover by virtue of the grant itself." See, also, *Cornwall v. Culver*, 16 Cal. 426; *Mahoney v. Van-*

winkle, 21 Cal. 576; *Thornton v. Mahoney*, 24 Cal. 576; *Airhart v. Massieu*, 98 U. S. 491.

Hereford & Lovell, for Appellee.

Plaintiff must show a legal title before it can maintain the action. "In an action of ejectment the plaintiff must recover, if at all, upon the strength of his own title; and the weakness of his adversary's title cannot avail him." *McNitt v. Turner*, 16 Wall. 352; *Watts v. Lindsey*, 7 Wheat. 158; *Marsh v. Brooks*, 8 How. 223; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. Rep. 631. "A plaintiff in ejectment, where the defendant is in possession, must show a valid legal title, and not merely an equitable one, to authorize a recovery. Where no such title is shown, defendant's possession is sufficient for his protection. *Morehouse v. Phelps*, 21 How. 294. Plaintiff has not established a legal or any title at all to the premises in question. Plaintiff claims under a Mexican grant, and alleges in its complaint that the surveyor-general of Arizona in 1880 recommended the same for confirmation.

The claim is therefore pending before Congress for its final determination as to the validity of the grant; and it necessarily follows that until Congress has finally acted, it is uncertain and undetermined whether plaintiff has any title or not. Congress may affirm or reject the claim. Congress constituted itself, in conjunction with the surveyor-general, a tribunal to pass upon and finally settle the title to Mexican land grants in this territory. No power or jurisdiction is conferred by the act of 1854 upon any other tribunal or court to determine the validity of such claims. "No jurisdiction over such claims in New Mexico was conferred upon the courts." *Maxwell Land Grant Case*, 121 U. S. 363; *Tameling v. United States Freeholder Co.*, 93 U. S. 662.

The plaintiff has shown that the question as to whether it has any title is still an open one, and pending before the only tribunal which can adjudicate it. This court cannot under the Maxwell case pass upon the validity of plaintiff's title, and, therefore, the plaintiff cannot recover in this action.

GOODING, C. J.—This was an action of ejectment brought by the appellant to recover possession of certain parcels of land described in the complaint. The case was tried by the

court, a jury having been waived, and the court made its findings and filed the same, and entered judgment for the defendant. The title of plaintiff rests upon a Mexican grant. The surveyor-general of Arizona had reported favorably on the grant, but the same had not been acted upon by Congress. The fifth finding reads as follows: "That on the 21st day of September, 1881, all of the title of the said Sykes, and being on the premises aforesaid, became by good and sufficient mesne conveyances in the law, and was, vested in the Santa Rita Land and Mining Company, the plaintiff herein; and on the day and year last aforesaid the plaintiff entered into the possession of portions of said premises, under a deed describing the whole thereof by metes and bounds, according to the survey made thereof by the Mexican government, as described in the *expediente* aforesaid, and by the surveyor-general of Arizona aforesaid; and from that time the said plaintiff has been in the continuous and actual occupation of a part of the said premises, and since or about the 1st day of January, 1883, has been upon said premises with a large number of cattle, and has been engaged in the raising of cattle thereon." The sixth finding reads as follows: "That plaintiff nor its grantors, John Curry and C. B. Sykes, nor either of them, were ever in the actual occupation of any part of the premises sued for in this action." The twelfth finding reads as follows: "That neither plaintiff nor any of its grantors were ever in the actual occupation of any of the premises claimed by defendant at any time subsequent to the Gadsen Purchase, nor was it or any of its grantors ever actually dispossessed therefrom, or from any part thereof, by the defendant or his grantors."

In the case of *Astiazaran v. Mining Co.*, 148 U. S. 80, 13 Sup. Ct. Rep. 457, the supreme court of the United States uses this language: "In this case Congress has constituted itself the tribunal to finally determine, upon the report and recommendation of the surveyor-general, whether the claim is valid or invalid. The petition to the surveyor-general is the commencement of proceedings 'which necessarily involve the validity of the grant from the Mexican government, under which the petitioners claim title. The proceedings are pending until Congress has acted, and while they are pending the question of the title of the petitioners cannot be contested

in the ordinary courts of justice.' Upon this short ground, without considering any other question, the judgment of the supreme court of Arizona is affirmed."

We think the question in this case is the same as in the case from which we have just quoted. The judgment of the court below will therefore be affirmed.

Kibbey, J., and Wells, J., concur.

[Criminal No. 73. Filed April 15, 1893.]

[33 Pac. 1024.]

UNITED STATES OF AMERICA, Plaintiff and Respondent, v. JEFFERSON WILSON, Defendant and Appellant.

1. CRIMINAL LAW—INSTRUCTIONS—DUTY OF COURT TO INSTRUCT.—On the trial of a murder case, evidence having been admitted of conversations between other persons, in the absence of the defendant, on the theory of conspiracy, without which evidence there was nothing to support a verdict of guilty, and defendant's request for an instruction defining "conspiracy" having been refused as faulty, the court should have instructed the jury as to what constitutes "conspiracy."

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Joseph H. Kibbey, Judge. Reversed.

The facts are stated in the opinion.

O. T. Rouse, and W. M. Lovell, for Appellant.

Thomas F. Wilson, U. S. District Attorney, for Respondent.

GOODING, C. J.—The defendant was convicted of the crime of murder, and the sentence was death. On the trial of the case evidence was admitted of conversations between other persons in the absence of the defendant. This evidence was admitted on the theory of conspiracy, and was of a kind

and in its nature very damaging to the defendant. Without this evidence there was nothing to support the verdict of guilty. The defendant asked an instruction defining "conspiracy." This instruction, taken as a whole, may have been faulty, though this we do not affirm. It was refused, and no instruction was given by the court undertaking to inform the jury what was necessary to establish conspiracy. The jury were left to consider evidence from which they might infer conspiracy without being instructed as to what was conspiracy in legal contemplation. We think, the instruction of the defendant having been refused, the court should have instructed the jury on this point. Further, we have carefully considered the entire evidence, and think it is not strong enough to support a judgment and sentence, even after verdict. We reach this conclusion after giving full weight to the action of the jury and the court. It is our opinion that the judgment and verdict should be set aside and the cause remanded for a new trial.

Wells, J., and Sloan, J., concur.

[Civil No. 370. Filed April 15, 1893.]

[77 Pac. 618.]

DON YAN, Plaintiff in Error, v. AH YOU, Defendant in Error.

1. TORTS—DEATH FROM WRONGFUL ACT—ACTION FOR DAMAGES—STATUTORY—REV. STATS. ARIZ. 1887, PAR. 2145.—A suit brought by the administrator of the estate of decedent, for the benefit of the widow and children, for damages resulting from his death, caused by the alleged wrongful act of appellant, is a statutory action, and the right to recover must be found within the provisions of the statute, *supra*.
2. SAME—SAME—SAME—INSTRUCTIONS—LIABILITY FOR ACTS OF AGENT—REV. STATS. ARIZ. 1887, PAR. 2145, CONSTRUED.—In an action for damages on account of injuries causing death, under statute, *supra*, providing that such actions may be brought "(1) When the death of any person is caused by the negligence of the proprietor . . . of any railroad . . . or other vehicle for the conveyance of

goods or passengers; or by the unfitness, gross negligence, or carelessness of their servants or agents; (2) When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another," instructions in effect that defendant was liable whether the negligence or default was his own or that of a partner or co-owner is error, it clearly appearing that he was not one of the persons mentioned in clause 1, *supra*, and it being the intention of the legislature to classify persons liable into those liable for their own acts, as well as those of their servants and agents, and those liable for their own neglect or wrongful act only.

WRIT OF ERROR from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Barnes & Martin, for Plaintiff in Error.

C. W. Wright, for Defendant in Error.

KIBBEY, J.—This was a suit by the administrator of the estate of Ah You, deceased, for the benefit of the widow and children of the deceased, for damages resulting from his death, caused by the alleged wrongful act of the appellant. There was a verdict for defendant in error.

There was evidence that Ah You and two or three others were co-owners of a drove of hogs; that among them was a vicious boar; that the hogs were kept and fed in a field through which ran an irrigating ditch; that the deceased had occasion to go into the field to clean out the ditch, so that it would serve to carry water to his garden, for the irrigation of which the ditch was constructed, and was attacked by the boar and received injuries from which he died; that the hogs were in charge of one of the co-owners, but not of the defendant; that the defendant had knowledge that the hog was vicious. There was a sharp conflict of evidence on most of these points.

The wrongful act complained of was the keeping of the boar by defendant after knowledge of his viciousness.

The court instructed the jury that if they believed from the evidence that the deceased was attacked and killed by the boar without fault on his part; that the boar was dangerous and known to be so by those in charge of him; that at the

time the boar attacked the deceased he was the property of the defendant, in whole or in part; and that the deceased left a widow and children surviving him, they should find for the plaintiff. The court further instructed the jury that "Before you can find for the plaintiff on the fourth proposition,—that is to say, that the boar at the time he attacked Ah You was the property of defendant either in whole or in part,—you must first believe from the evidence that the defendant, Don Yan, had a moneyed interest in the said boar. If you shall believe from the evidence that the said boar was at the time of his attack upon said Ah You the property of the defendant, or that said boar at said time was the property of a copartnership in which the defendant was at said time a member, or in which he had at said time an interest in the profits of said copartnership, although you may believe that he was not an active member thereof, then your verdict will be for the plaintiff as to this issue."

There were other instructions on the subject, but they need not be quoted at length. They were in effect that the defendant below was liable in this action whether the negligence or default was his own or that of a partner or co-owner.

Defendant in error (plaintiff below) cites many cases to the general proposition that the principal is liable for the negligent acts of the agent, and urges that upon the authority of those cases the instruction of court to the jury was correct.

The action at bar, however, is statutory, and the right to recover must be sought within its provisions.

The statute provides: "Section 1. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: 1. When the death of any person is caused by the negligence of the proprietor, owner, charterer, or driver of any railroad, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers; or by the unfitness, gross negligence or carelessness of their servants or agents; 2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another."

The right of action in this case, if given at all, is given by the second clause above quoted. The omission in that clause to impose liability for negligence, etc., of servants or agents is significant. The statute clearly makes a classification of

the cases in which a right of action is given, and the only distinction between the two classes is, that in one class persons are liable for their own, and as well the negligence of their servants and agents; while in the other persons are liable for their own neglect or wrongful act only. To insert into the second clause by construction the provisions that those included in that class shall be liable for their own negligence and that of their servants and agents at once destroys the classification which was so evidently intended by the legislature, and practically eliminates the first clause of the section from the statute, for then those mentioned in the first clause would be included within those in the second.

The familiar rule of statutory construction requires that we shall give effect to both clauses if it can reasonably be done. Giving to the language of the statute its very plain meaning, and limiting ourselves to that, we are of the opinion that no persons in this territory, except those described in the first clause of the section we have quoted, are liable for damages for injuries resulting in death caused by the negligence or wrongful act of servants or agents.

The plaintiff in error is not one of those persons; hence if in fact the death of plaintiff's intestate was caused not by neglect of the defendant, but by his agents, he is not liable.

The instructions are therefore erroneous, and, there being a sharp conflict of evidence as to the facts, prejudicial to the plaintiff in error.

Our statute is an exact rescript of the Texas statute on the same subject. The supreme court of that state recently in construing that statute came to the same conclusion to which we arrive. *Hendrick v. Walton*, 69 Tex. 193, 6 S. W. 749. And the circuit court of appeals for the fifth circuit follows the same construction. *Archer v. Cabell*, 50 Fed. 818. The judgment will therefore be reversed and the cause remanded to the lower court, with direction to grant a new trial.

[Civil No. 349. Filed April 15, 1893.]

[77 Pac. 619.]

HUACHUCA WATER COMPANY, Defendant and Appellant, v. GEORGE W. SWAIN, Plaintiff and Appellee.

1. **EVIDENCE—OPINIONS—PRUDENCE OF INJURED PERSON—QUESTION FOR JURY.**—A question as to whether a person, ordinarily prudent, could fail to have perceived the trench into which plaintiff fell is clearly objectionable, it calling for the opinion of the witness as to the prudence of the plaintiff, which is a question for the jury.
2. **SAME—SAME—QUANTITY OF LIGHT—COMPETENCY.**—Opinions of witnesses as to the quantity of light are competent, but the inquiry must be limited to the degree of light or darkness.
3. **APPEAL AND ERROR—HARMLESS ERROR—OBJECTION SUSTAINED TO QUESTION WHERE OTHER SIMILAR QUESTIONS ARE PERMITTED.**—Where a question, to which objection is sustained, is proper, such error is harmless, inasmuch as a very similar question was asked and the witness was allowed to answer.
4. **PERSONAL INJURIES—STREET AND SIDEWALKS—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK—INSTRUCTIONS—KNOWLEDGE OF DANGER—FAILURE TO EMBODY ELEMENT OF KNOWLEDGE IN INSTRUCTION.**—An instruction that "the rule denying the right of recovery for negligence in cases in which the plaintiff by simply looking would have avoided the injury complained of, is one of wide application, and the jury is instructed that if the plaintiff fell into the excavation in question (in a public street), while walking along at night, absorbed in thought, or with mind preoccupied, and not looking where he was going, but might have seen the excavation if he had looked, and have avoided it, then he is guilty of contributory negligence, and cannot recover," is properly refused, as it requires of the plaintiff, a passenger along a public street, which he has a right to assume is safe, a greater degree of vigilance than the law imposes. Though there was evidence in the case tending to show that plaintiff had knowledge of the existence of the trench, and that therefore he would be negligent if he failed to look for it and avoid it, the above instruction does not embody the element of knowledge and the refusal of the trial court to give it was proper.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

William Herring, for Appellant.

W. H. Stilwell, for Appellee.

KIBBEY, J.—This is a suit by the appellee against the appellant for damages for personal injuries.

It is alleged that the appellant, the Huachuca Water Company, excavated a trench twenty-five feet in length, forty inches deep, and thirty inches wide, in a public street in the city of Tombstone; that the company left the trench open, unguarded, and without anything to indicate its dangerous character; that in the night-time the appellee, while attempting to cross the street, without fault on his part, fell into the trench and sustained serious bodily injuries.

There was a trial below which resulted in a verdict for the appellee. The appellant here complains of the ruling of the lower court in excluding and admitting evidence, and in giving and in refusing to give certain instructions to the jury. We will notice the alleged errors in the order in which they are presented in appellant's brief.

While a witness for appellee was on the stand, appellant asked him upon cross-examination, "Could a person at the time Mr. Swain came to your office on the evening of this accident, who crossed from Barrow's barber-shop, diagonally across Allen Street to your place, ordinarily prudent, fail to perceive the ——— which you have described, the line of earth which you have described, and the trench which you have described?" The court sustained an objection to the question. Other questions of similar import were asked of this and other witnesses and objections sustained to them.

We think this question clearly objectionable. The question of prudence or want of prudence is one for the jury, and not for the witness.

Prudence or want of prudence cannot affect the sight. An imprudent man can see as well as a prudent one. True, an imprudent man may neglect the use of that faculty where safety to himself required its use. In such a case contributory negligence would be imputed to him.

The question calls for the opinion of the witness not so much as to the quantity of light, as urged by appellant, as to the exercise of prudence. If the witness had been permitted to

answer the question, and had he answered it in the negative, it would have been but his opinion that the person who did not see the trench under the circumstances described was imprudent.

Appellant urges that the question was intended to elicit information only as to the quantity of light, and cites a number of authorities that opinions in such matters are competent. This is true enough.

A witness may be asked whether it was light enough for objects to be seen, and may be asked at what distance they can be seen, to determine the quantity of light. But the inquiry must be confined to the degree of light or darkness.

If it were broad daylight, and plaintiff walked into the trench, he might have been deemed imprudent, but that was for the jury and not for the witness to determine. The question is otherwise objectionable, but we need not further discuss it.

There was no error in the ruling of the court in sustaining the objection.

The appellant asked the appellee upon cross-examination if there was not sufficient light at the time of the accident to permit a person standing upon the sidewalk (of the street in which the trench was excavated) to see the trench. The court sustained the objection to the question. We think the question was a proper one, but, upon the whole record, we cannot see that the appellant was materially injured by the ruling, inasmuch as a very similar question was asked and the witness was allowed to answer.

A witness was permitted to testify that on the evening of the accident he, in company with his wife, came out of a restaurant, started across the street, and became aware of the existence of the trench only by walking into the pile of earth thrown out of it. Appellant moved to strike out this evidence. We think this evidence was not relevant, but we have carefully examined the record and cannot see that appellant was materially injured by the ruling. The appellant complains of one of the instructions given by the court to the jury. The instruction states the law correctly, and it is not open to the objections of the appellant that it comments on the evidence.

The appellant asked the court to give the following instruction to the jury: "The rule denying the right of recovery for

negligence in cases in which the plaintiff by simply looking would have avoided the injury complained of, is one of wide application, and the jury is instructed that if the plaintiff fell into the excavation in question while walking along at night, absorbed in thought, or with mind preoccupied, and not looking where he was going, but might have seen the excavation, if he had looked, and had avoided it, then he is guilty of contributory negligence and cannot recover." The court refused the instruction.

The court did, however, fully instruct the jury upon the subject of negligence and of contributory negligence.

The instruction asked, and which the court refused, does not, in our opinion, fully state the law. It requires of the plaintiff, as passenger along a public street, which he has a right to assume is safe, a greater degree of vigilance than the law imposes.

Appellant urges that as there was evidence in the case tending to show that appellee knew, or had such opportunities to know, of the existence of the trench that he might fairly be charged with such knowledge, and that therefore he would be negligent if he failed to look for it and avoid it.

This is true, but the instruction asked does not embody the element of knowledge by the appellee of the existence of the trench.

We think the instructions given in the case were full and correct. We find no errors in the record that warrant us in reversing the case. The judgment is therefore affirmed.

Gooding, C. J., and Wells, J., concur.

[Civil No. 342. Filed May 3, 1893.]

[33 Pac. 821.]

WILLIAM MCGILL, Plaintiff and Appellee, v. SOUTHERN
PACIFIC COMPANY, Defendant and Appellant.

1. FELLOW-SERVANTS—SECTION-MAN—CONDUCTOR—HOBSON v. RAILROAD Co., 2 ARIZ. 171, CITED.—A section foreman is not a fellow-servant of the conductor of a railway train upon which he is being carried

from the point where he has been at work. *Hobson v. Railroad Co.*, *supra*, cited.

2. VERDICT—DAMAGES—EXCESSIVE—REMITTITUR—CONDITION TO DENYING NEW TRIAL.—Verdict held excessive, and district court ordered to modify judgment, provided plaintiff shall elect to remit ten thousand dollars from his former judgment; otherwise, a new trial ordered.

Reversed on rehearing. 5 Arizona, 44 Pac. 302.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

J. A. Zabriskie, and Maxwell & Satterwhite, for Appellant.

The law applicable to the case at bar is: "That if the plaintiff, at the time of the accident, was in the employ of the defendant, operating said railroad, and was not subject to the orders of the conductor of the work-train, and the accident occurred by the carelessness and negligence of a co-employee, who was engaged in the same general employment, then the plaintiff cannot recover in this action."

Redfield on Railways (6th ed., vol. 1, pp. 554, 555) states the rule as follows: "It seems to be now perfectly well settled in England, and mostly in this country, that a servant who is injured by the negligence or misconduct of his fellow-servant, can maintain no action against the master for such injury." Citing the following cases: 3 Mees. & W. 1; 5 Exch. 354; 1 McMull. 385, 36 Am. Dec. 268; 6 Barb. 231; 5 Exch. 343, 4 Met. 49, 38 Am. Dec. 339, and note; 6 Hill, 592, 41 Am. Dec. 771; 3 Cush. 270; 15 Barb. 574; 15 Ill. 552; 9 Cush. 112; 6 Am. Law Reg. 352; 38 Wis. 289; 51 Tex. 270; 49 Cal. 128; 51 Cal. 255; 30 Wis. 674; 11 Am. Law Reg. 641; 14 Fed. 803; 25 Am. Law Reg. 484; 79 Cal. 97, 21 Pac. 437; 67 Ill. 498; 14 Fed. 277; 85 Ill. 500; 44 Wis. 638; 20 Barb. 449; 23 Pa. St. 384; 6 Ind. 205; 11 Fed. 564; 32 Mich. 510; 81 N. C. 446, 31 Am. Rep. 512; 44 Cal. 70; 53 Cal. 35; 18 Wis. 731; 100 U. S. 214; 4 West Coast R. 563; 88 Cal. 360, 26 Pac. 175; 11 Kan. 83; 3 Dill. 319, Fed. Cas. No. 3916; 49 Miss. 258; 59 Ala. 245.

This general rule involves no federal question, and is not open to denial in federal courts any more than elsewhere.

Patterson on Railway Accident Law says (p. 342): "Railway servants take upon themselves the ordinary risks of the service, including the negligence of fellow-servants." On page 356 he says: "The common object of railway service being that of fitting the line for traffic, and of carrying on the traffic, all who are employed in the accomplishment of the object, and whose negligence may be the cause of injury to one another, are deemed to be fellow-servants."

Patterson further says (p. 355): "The general rule, therefore, is, that servants take the risk of their fellow-servant's negligence, and the master, if he has not been negligent in the selection or retention of the negligent fellow-servant, is not impliedly liable to indemnify them for any injury resulting from the negligence of that fellow-servant." Citing: 11 Exch. 832; 3 H. & C. 589; 16 C. B. N. S. 669; 23 Pa. St. 110; 10 Allen, 233, 87 Am. Dec. 635; 5 N. Y. 492; 25 N. Y. 562; 111 U. S. 313, 4 Sup. Ct. Rep. 433; 32 Vt. 473; 15 Am. & Eng. R. R. Cases, 243; 76 Me. 143; 76 Ill. 395; 26 Iowa, 363; 7 Ohio St. 197; 2 H. & C. 102; 6 C. B. N. S. 429; 17 N. Y. 134; 38 Pa. St. 104, 80 Am. Dec. 467; 10 Cush. 228; 18 N. Y. 432; 93 Pa. St. 479; 53 Pa. St. 453; 109 U. S. 478, 3 Sup. Ct. Rep. 322; 46 Tex. 540; 42 Mich. 523, 4 N. W. 203; 43 Me. 269.

In *Abend v. Terre Haute etc. Ry.*, 111 Ill. 202, 53 Am. Rep. 616, the court say: "The foreman of wreckers while being carried on a wrecking train to the scene of a wreck voluntarily seated himself in the engine cab, and was killed in a collision between that train and another. The evidence showed that the wrecking force is always made up in a hurry out of the employees and servants of the company, without regard to the particular line of service in which they are employed. The removing of obstruction from the track is a distinct branch of the service, to which all the laboring force of the company are liable to be called without any reference to their ordinary duties, and when the force thus made up goes aboard the wrecking train and starts to the scene of the disaster, they are all, including conductor, engineer, foreman, and brakeman, put as much in a common branch of the service, while on the way, as they are after their arrival, and the work of

clearing the track has commenced. It was an error to suppose that a force of men cannot be engaged in a common cause, unless all are continuously working at the same time, and engaged in doing precisely the same kind of work. It is sufficient if they are all employed by the same master, and the work of each, whatever it may be, has for its immediate object a common end or purpose, sought to be accomplished by the united effort of all." The doctrine of this case completely covers our case, so far as fixing the plaintiff and the conductor, Barrett, in the same common employment as co-employees is concerned.

For a comprehensive list of cases showing the different classes of servants who are held to be fellow-servants, see Patterson on Railway Accidents, pp. 365, 366, 367.

The only case that stands squarely against this great weight of authority is the case of the *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. The facts in this case were these. The plaintiff, Ross, was the engineer of a freight train at the time of a collision with a gravel train on the same road, and was seriously injured in the collision. At the time of the collision the train was running under a printed regulation of the company, which provided that "The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road," etc. In that case, under that regulation of the company, the conductor stood in the relation of superior or vice-principal towards the engineer who was running the engine, and the engineer must necessarily obey his orders when running the train.

Here lies the distinction between that case and the case at bar. In this case the plaintiff was in no sense whatever under the orders or direction of the conductor, Barrett; and this is the pivotal point of difference between the two cases. In that case Justice Field says: "There is, in our judgment, a clear distinction to be made in their relation to their common principal between servants of a corporation, exercising no supervision over others engaged in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." Even in that case Justice Field recognizes one universally conceded

rule when he says: "The general liability of a railroad company for injuries, caused by the negligence of its servants to passengers and others is conceded. But where the injuries befall a servant in its employ, a different rule applies. Having been engaged for the performance of special services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is, that he has, or in law is supposed to have them in contemplation, when he engages in the service, and that his compensation is arranged accordingly. He cannot in reason complain if he suffers from the risk which he voluntarily assumes, and for the assumption of which he is paid. There is another reason assigned for this exemption: that of supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution, on the part of the servant, as well for his own safety as that of his master. Much potency is ascribed to this assumed fact, by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. When the service to be performed requires for its performance the employment of several persons, as in the movement of railway trains, there is, necessarily, incident to the service of each, that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and England, that there is implied in his contract of service in such cases, that he takes upon himself the risks arising from the negligence of his fellow-servants, while in the same employment, provided the master is not negligent in their selection or retention, and that if injuries then befall him from such negligence, the master is not liable."

We therefore submit that the refusal of the court to give the charge requested by defendant on the question of fellow-servants, and what kind of service constitutes fellow-servants, was error.

Francis J. Heney, and G. C. Israel, for Appellee.

The instruction regarding fellow-servants directly followed the Ross case, leaving it to the jury to find from the evidence whether Barrett was the conductor of the train upon

which the defendant was, and whether he had charge of said train.

WELLS, J.—This action was brought by plaintiff, who was in the employment of defendant as a section foreman on its railway, for injuries sustained by him in a collision between two railway trains, caused by the alleged negligence of the conductor of the train in which he was at the time of the injury. At the trial below several questions were asked, to the ruling of the court on which the defendant took exceptions and assigned as error, as well as exceptions to the charge of the court to the jury. The part of the charge of the court of which the defendant most particularly complains reads as follows: "The court instructs the jury that a conductor of a railway train, who commands its movements, directs when it shall start, at what station it shall stop, and has the general management of it, and control over the persons employed upon it, represents the railway company, and is not a fellow-servant with a section foreman in the employ of said company; and if the jury believes from the evidence that John Barrett was the conductor of the train upon which plaintiff was, and had the powers just stated regarding such train, the court instructs the jury that Barrett was not a fellow-servant with the plaintiff." The disposition of this assignment principally settles the rights of the parties in the case, for if the defendant is liable for the injury sustained by the plaintiff (which the jury has so found), we regard it unnecessary to consider whether many of the other points or rulings of the court were correct or erroneous, for we think the general result would have been unchanged.

Is the defendant liable for the negligence (conceding there was negligence) of John Barrett in causing the injury to plaintiff complained of? From the evidence we gather that plaintiff was in the employment of the defendant, who is a railway corporation, as a section foreman, and whose duty it was to repair all injuries to the road-bed and track of defendant's railway, and to perform such other work of like character as the defendant should direct him to do. On the twenty-third day of August, 1890, he was ordered by the road-master acting for the defendant to go to a certain point on the line of defendant's railway in the county of Pima,

Arizona, taking with him his working force, and grade and lay a temporary track for the purpose of raising an engine. John Barrett was the conductor of the train which was furnished by defendant to take the plaintiff and his working force to and from the place of work. The plaintiff was by Barrett carried to the working point, at which place he and his workmen worked until about three o'clock, when he was told by Mr. Lloyd, the civil engineer, foreman, and acting road-master, as well as by Barrett, the conductor, to get aboard the work-train, when they would work their way back home. The plaintiff and his men got on the train, and were being carried by it, backing up the track, when the collision with another train occurred, in which the plaintiff sustained the alleged injury. Both Barrett and the plaintiff were in the employment of the same company, and the question whether they were fellow-servants within the reason of the law, and engaged in the same common employment, so as to exempt the company from liability from personal injury caused by the negligence of a co-servant, is the controlling point in the case.

The case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, upon which plaintiff seems chiefly to rely, sustains the above charge of the court. The court there clearly makes a distinction in their relation to their common principal between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porter, and other subordinate employees. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. . . . We know from the manner in which railroads are operated that, subject to the general rules and orders of the directors of the companies, the conductor has the entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements. In no

proper sense of the term is he a fellow-servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction. As to them and the train he stands in the place of and represents the corporation." The above doctrine is sustained by very respectable authorities cited in the opinion of the court in the case, and, if correct, is decisive of the question under consideration. In the case at bar it was the duty of the conductor of the train to convey the plaintiff and his workmen to and from the place where they were to perform their work or duties, which were entirely distinct and different from that of Barrett, the conductor. The plaintiff's duties were in no wise connected with or relating to the train, its working or management, nor was he in such a position that he could in any degree control or influence the conductor in starting, handling, or managing the train. His work was not upon the train, nor about it, nor had he any connection with it except to be conveyed by it to and from the place of his work, and while being so conducted he was injured. We think there can be no question of Barrett's being the conductor of the train. That fact was submitted to the jury by the above charge, and the jury found in the affirmative. He answered the requirements defined in the case of *Railroad Co. v. Ross*, *supra*, and represented the company; and under the rule of that case, for personal injuries resulting from his negligent acts, if any, the company is responsible. The supreme court of this territory has similarly held in a case where the facts were much like those in this case. *Hobson v. Railroad Co.*, 2 Ariz. 171, 11 Pac. 545. The defendant, questioning the soundness of this doctrine, refers us to the case of *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166. The principle announced in that case, "that, in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself," has no direct bearing upon the questions just being considered,—viz., whether the conductor, Barrett, and the track foreman, McGill, were fellow-servants within the reason of the law, and engaged in the same employment, so as to exempt the company from injury caused by the negligence of a co-servant. The former announces a general

principle, recognized everywhere and questioned by none, and applies in a general sense to every case of personal injury; while the latter invokes an additional rule in cases where the injury is caused by the negligence of a fellow-servant. The case of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, is very similar to the case of *Tuttle v. Railway Co.*, *supra*, where a switchman was injured by a train where there was a "net-work of tracks." There was no evidence that the track was improperly constructed or that the engine-driver was unfit for his duty. The court there says that the general rule of law is well established that one who enters into the service of another takes upon himself the ordinary risks of the negligence of his fellow-servant in the course of his employment. There the plaintiff was in attendance upon the switches, and must have known all the dangers attendant thereupon, and could look out for the consequences. The law of the case is in perfect harmony with that of *Railroad Co. v. Ross*, *supra*. In the former a brakeman working a switch for his train on one track in a railroad yard is a fellow-servant with the engineer of another train of the same corporation upon an adjacent track. In the latter case the court held that the conductor of a train is not a fellow-servant with the brakeman, engineer, and fireman, but that the brakeman, engineer, and fireman were fellow-servants in the running of the train. In the case at bar there were no such conditions as in the case of *Randall v. Railroad Co.*, *supra*. The conductor, with his train, was taking the plaintiff from his work, which was entirely separate and distinct from the work or employment of the conductor. The case of *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. Rep. 433, is not an analogous case. A carpenter with years of experience, with one of his comrades, was directed by the foreman to push the joist out on some projecting sticks of timber, but he did not direct him to go out. If the carpenter had kept both feet inside the wall he could have pushed the joist as directed without danger, but he got out onto the projecting sticks, which gave way. There was no evidence tending to prove negligence on the part of the defendant or his superintendent or his foreman. The plaintiff, McGill, was upon the train, not in the discharge of any duty connected with the running or management of it, but was there being carried from his work to another point on

the line. The conductor hurriedly directed him and his men to get on the train, so as to get his train out of the reach of an approaching train, which was due and on time. The plaintiff had no choice in the matter. He considered, and he had a right so to do, that if he did not comply with the direction of the conductor, he would be left at a long distance from the station, to find his way there as best he could.

Upon the question of negligence of Conductor Barrett resulting in the injury of plaintiff the testimony is conflicting. The jury found that there was negligence, and, further, that plaintiff was not at fault. We cannot disturb the verdict on that ground.

A further consideration of the other assignments would lengthen the discussion without any beneficial results. We are inclined to the opinion that no error was committed by the lower court which could justify a reversal of the case.

The jury returned a verdict of twenty-five thousand dollars in favor of the plaintiff. We infer that this amount was rendered upon the theory that the plaintiff was permanently injured, so as to incapacitate him from earning a livelihood for himself and family. We do not think the testimony warrants such a conclusion, or that the plaintiff's injury amounted to that sum, and therefore consider the verdict excessive, and are of the opinion that the judgment should be reduced to the sum of fifteen thousand dollars. The district court is therefore hereby directed to modify its judgment by rendering judgment against the defendant and in favor of the plaintiff for the sum of fifteen thousand dollars, provided the plaintiff shall elect to remit the sum of ten thousand dollars from his former judgment; and in case he does not so elect a new trial of the whole case is ordered.

Gooding, C. J., and Kibbey, J., concur.

[Civil No. 354. Filed June 16, 1893.]

[33 Pac. 710.]

THE SOUTHERN PACIFIC COMPANY, Defendant and Appellant, v. BERTHA TOMLINSON, Plaintiff and Appellee.

1. **REMITTITUR—AUTHORITY TO REMIT—PLAINTIFF IN ACTIONS FOR INJURIES RESULTING IN DEATH—REV. STATS. 1887, PAR. 2150, CITED AND CONSTRUED.**—Under paragraph 2150, *supra*, providing that an action for injuries resulting in death “may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all,” a widow has authority to bring suit for herself, children, and parents of the deceased. The authority to bring includes also full authority to prosecute, control, and direct the suit to its final determination. If to prevent a new trial being granted, she may remit such portion of the damages awarded by the jury as may be necessary to that end.
2. **SAME—MOTION TO SET ASIDE VERDICT—ALLOWING REMITTITUR AS CONDITION TO OVERRULING MOTION—DISCRETIONARY.**—A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of the power rests in the sound discretion of the court.
3. **SAME—VERDICT—PASSION—MUST BE SET ASIDE—MUST CONSIDER WHOLE CASE.**—Where the verdict is the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question the court should look not alone to the amount of the damages awarded, but to the whole case.
4. **NEGLIGENCE—EVIDENCE—DEATH BY WRONGFUL ACT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE UNDER CASE MADE QUESTIONS FOR JURY—REV. STATS. ARIZ. 1887, PAR. 322, CITED.**—Where the testimony of plaintiff in an action for wrongful death tended strongly to show that at the time of the accident the train which killed the deceased was running at a high speed, without warning of its approach, as required by paragraph 322, *supra*, through a village and across a crossing used by deceased and other residents; that upon the north side of the track were obstructions which concealed the train, while upon the south side the view was open; that deceased a few minutes before the train came went over to the north side, and was supposed to have been struck when returning to the south side, which supposition was supported by the fact that the only witness to the train’s approach saw no one step on the south side, and injuries of deceased were upon his left side, and that the right flagstaff

on the pilot was broken off and found near deceased's body, the case is sufficient to justify the court in leaving the questions of the negligence of defendant, as well as contributory negligence on the part of deceased, to the jury.

5. SAME—CONTRIBUTORY—DUE CARE PRESUMED—BURDEN OF PROOF—LOPEZ v. CENTRAL ARIZONA MINING CO., 1 ARIZ. 464, 2 PAC. 748, FOLLOWED.—The rule in this territory, as declared by the supreme court in the case of *Lopez v. Central Arizona Mining Co.*, *supra*, is, that in actions for personal injuries, where contributory negligence is relied upon as a defense, due care and caution on the part of plaintiff, in absence of proof to the contrary, will be presumed, and the burden of proving such contributory negligence rests upon the defendant. In actions for damages in injuries causing death the same rule prevails.

REVERSED.—*Southern Pacific Co. v. Tomlinson*, 163 U. S. 369, 41 L. Ed. 193, 16 Sup. Ct. Rep. 1171.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

W. R. Stone, and H. N. Alexander, for Appellant.

The complaint alleges that it was by no fault or negligence of Tomlinson's that the injury was caused. This is a material allegation, and must be proved as laid. In some states it is held that it is not necessary to allege or prove on the part of the plaintiff that the person injured was exercising proper care; that the defendant has the burden of proof to establish the contributory negligence, while in others the rule is, that not only must the plaintiff prove negligence on the part of the defendant, but must also prove that the person injured was without fault, to entitle him to recover,—at least, must make a *prima facie* case to entitle it to go to the jury; but where the allegation is made a material allegation in the complaint it must be proved. Weeks on Damnum Absque Injuria (p. 245) says: "In an action for injuries, where a party crossing a railroad track is injured by a collision with a train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury." *Cincinnati etc. Ry. Co. v. Howard*, 124 Ind. 280, 19 Am. St. Rep. 96, 24

N. E. 892; *Hinkley v. Cape Cod Ry. Co.*, 120 Mass. 257; *Murphy v. Cape Cod Ry. Co.*, 45 Iowa, 661; Abbott's Trial Evidence, pp. 594, 595, 596; *Houston etc. Ry. Co. v. Cowser*, 57 Tex. 293. "Upon a motion to direct a verdict for the defendant, the question is whether, if a verdict were rendered for the plaintiff upon his evidence, the court would set it aside as being contrary to the evidence." *Held*, that "where the plaintiff was familiar with the crossing, and where he had a fair view of the railroad from the depot to the crossing, about seventy rods, and could have seen the track for a distance any time after approaching within six hundred feet of the crossing, it was contributory negligence for him to drive upon the track without looking for an approaching train, and he could not recover, even if the engineer was also negligent in running the train at a great and dangerous rate of speed and failing to give warning of his approach by sounding the whistle or ringing the bell." *Schofield v. Chicago etc. Ry. Co.*, 2 McCrary, 268, 8 Fed. 488; same case affirmed in 114 U. S. 615, 5 Sup. Ct. Rep., 1125; *Harty v. Central Ry. Co.*, 42 N. Y. 468; *Warner v. New York Central Ry. Co.*, 44 N. Y. 465; *Wilcox v. Rome etc. Ry. Co.*, 39 N. Y. 358, 100 Am. Dec. 440; *Indianapolis etc. R. Co. v. Blackman*, 63 Ill. 117; *Wichita and W. Ry. Co. v. Davis*, 37 Kan. 743, 1 Am. St. Rep. 275, 16 Pac. 78; *Mynning v. Detroit etc. Ry. Co.*, 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147.

"Where in an action for negligence the plaintiff by his own showing has been guilty of negligence, a compulsory nonsuit should be granted." *Delaney v. Milwaukee etc. Ry. Co.*, 33 Wis. 67; *Randall v. Baltimore etc. Ry. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Spicer v. Chesapeake etc. Ry. Co.*, 11 L. R. A. 385, 34 W. Va. 514, 12 S. E. 553; *Studley v. St. Paul etc. Ry. Co.*, 48 Minn. 249, 51 N. W. 115; *State v. Maine Central Ry. Co.*, 76 Me. 276; *Tolman v. Syracuse etc. Ry. Co.*, 98 N. Y. 198, 50 Am. Rep. 649; *Mynning v. Detroit etc. Ry. Co.*, 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147, 23 Am. & Eng. R. R. Cases, 317.

"Plaintiff cannot recover for injuries from another's negligence unless he himself was using due care at the time of the injury; and the burden is on him to prove affirmatively that he used such care." *Gaynor v. Old Colony Ry. Co.*, 100 Mass. 308, 97 Am. Dec. 96; *New Orleans etc. R. R. Co. v. Statham*,

42 Miss. 607, 97 Am. Dec. 478, and note; *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. 722; *Nixon v. Chicago etc. Ry. Co.*, 84 Iowa, 331, 51 N. W. 157; *Haines v. Illinois etc. Ry. Co.*, 41 Iowa, 227; *Korrady v. Lake Shore etc. Ry. Co.*, 131 Ind. 261, 29 N. E. 1069; *Baltimore etc. Ry. Co. v. Depew*, (Ohio) 12 Am. & Eng. R. R. Cases, 64; *Union Pacific Ry. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, 19 Am. & Eng. R. R. Cases, 376; *McAdoo v. Richmond etc. Ry. Co.*, 105 N. C. 140, 11 S. E. 316, 41 Am. & Eng. R. R. Cases, 524; *Cincinnati etc. Ry. Co. v. Howard*, 124 Ind. 280, 19 Am. St. Rep. 96, 24 N. E. 892, 8 L. R. A. 594; *Maryland v. Pittsburg etc. R. R. Co.*, 123 Pa. St. 487, 10 Am. St. Rep. 541; *Memphis etc. Ry. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Spicer v. Chesapeake etc. Ry. Co.*, 34 W. Va. 514, 12 S. E. 553, 45 Am. & Eng. R. R. Cases, 28.

The plaintiff had no authority to remit anything from the verdict for the beneficiaries.

“The amount recovered in the one suit for causing the death of the husband must be apportioned by the jury among those entitled to the judgment.” *Galveston etc. Ry. Co. v. Le Gierre*, 51 Tex. 189; *March v. Walker*, 48 Tex. 372; *Houston etc. Ry. Co. v. Bradley*, 45 Tex. 171; *East Line etc. Ry. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820.

The judgment is not based on the verdict of the jury, but solely on the offer of the nominal plaintiff and the consent of the court, and we contend that the verdict as presented to the court by the jury should be allowed to stand, or that if it was so excessive as to show that it was rendered under the influence of passion, prejudice, or other motive, and not sustained by the evidence, then it should have been set aside and a new trial granted; that it was error for the court to allow the nominal plaintiff to reduce and remit any portion of the verdict except the sum awarded to her by such verdict. *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696; *Koeltz v. Bleekman*, 45 Mo. 320; *Nudd v. Wells*, 11 Wis. 426; *Potter v. Chicago etc. Ry. Co.*, 22 Wis. 586; *Goodno v. City of Oshkosh*, 28 Wis. 300. “It is the judgment of the jury, and not of the court, which is to determine the damages in actions for personal injuries.” *Sargent v. ———*, 5 Cow. 119; *McConnell v. Hampton*, 12 Johns. 234.

“But if the verdict is grossly excessive and unwarranted

by the evidence, it cannot be cured by a *remittitur*." *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1086; *Atchison etc. Ry. Co. v. Cone*, 37 Kan. 567, 15 Pac. 499; *Steinbuchel v. Wright*, 43 Kan. 307, 23 Pac. 560.

"It is an invasion of the rights of the jury for a judge to require a *remittitur* as a condition to his overruling a motion for a new trial on the ground of an excessive verdict, and his only course is to grant a new trial." *Gulf etc. Ry. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492.

Baker & Campbell, and G. C. Israel, for Appellee.

The court properly refused at the close of plaintiff's case to instruct the jury to find for the defendant. While we introduced no proof of the conduct of the deceased at the exact time of the injury, yet having affirmatively shown negligence on the part of the defendant, the jury had a right to infer ordinary care and diligence on Tomlinson's part. To hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of the other. *Gay v. Winter*, 34 Cal. 153; *Johnson v. Hudson River R. R. Co.*, 5 Duer, 21; *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Hopkins v. Orr*, 124 U. S. 510, 8 Sup. Ct. Rep. 590; *Arkansas etc. Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. Rep. 458.

SLOAN, J.—This action is brought under the provisions of title 36 of the Revised Statutes of 1887, entitled "Injuries Resulting in Death." Plaintiff, Bertha Tomlinson, as the widow of Thomas Tomlinson, deceased, brought suit in her own name against the Southern Pacific Company, for the benefit of herself, as surviving wife, as well as for the children and parents of the deceased, to recover damages sustained by the death of said deceased, which occurred, as alleged, by reason of the negligence of the defendant. In addition to a special verdict, the jury returned a verdict for plaintiff in the sum of fifty thousand dollars, which amount was apportioned among the beneficiaries named in the complaint as follows: Bertha Tomlinson, plaintiff, eight thousand dollars; Fenton Tomlinson, father, five thousand dollars; Mary Tomlinson, mother, five thousand dollars; Alice Tomlinson, child, eight thousand dollars; Fenton Tomlinson, child, eight thousand dollars;

Howard Tomlinson, child, eight thousand dollars; Baby Tomlinson, child, eight thousand dollars. The defendant moved the court to set aside the verdict, and grant a new trial, on the ground, among others, that the verdict was excessive, and rendered under the influence of passion or prejudice. Whereupon plaintiff, by her attorneys, filed a *remittitur*, which was in words and figures following, to wit: "Comes Bertha Tomlinson, on behalf of herself and the others interested herein, and remits from the verdict heretofore rendered therein, in the sum of \$50,000, the following sums: Bertha Tomlinson, \$8,000, remitted to \$6,000; Alice Tomlinson, \$8,000, remitted to \$3,000; Fenton Tomlinson, \$8,000, remitted to \$3,000; Howard Tomlinson, \$8,000, remitted to \$3,000; Baby Tomlinson, \$8,000, remitted to \$3,000; Fenton Tomlinson, father, \$5,000, remitted to \$1; Mary Tomlinson, mother, \$5,000, remitted to \$1,—thereby making a total remittance of \$31,998, and allowing the verdict to stand in the sum of \$18,002." The court then overruled the motion for a new trial, and entered judgment for plaintiff in accordance with the *remittitur*. It is alleged by appellant that the court erred in allowing the *remittitur*, and entering judgment in accordance therewith—First, for the reason that the plaintiff had no power to remit any portion of the damages awarded by the jury, except, perhaps, the portion allowed to her by the verdict; and second, for the reason that, the damages being excessive, it was evident that the jury in returning any verdict for plaintiff, acted through passion or prejudice; and therefore a *remittitur* could not possibly operate to cure the verdict thus wrongfully found.

As to the right of the nominal plaintiff, in an action for damages on account of injuries causing death, we are not cited to any authorities directly in point. Independent of the statute, the right to maintain such action does not exist. We are therefore left in determining this question solely to a consideration of the sections of the statute which bear upon the question. Paragraph 2149 of the Revised Statutes, being section 5 of said title 36, provides that "the action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be

liable for the debts of deceased." Paragraph 2150 provides that "the action may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all." The paragraph last quoted gives the widow authority to bring suit for herself, children, and parents of the deceased, if any there be, living at the time of the death of deceased. The authority to bring, it seems to us, includes also full authority to prosecute, control, and direct the suit to its final determination. If, to prevent a new trial being granted, it be necessary to remit a portion of the damages awarded by the jury, we see no reason why she may not under the statute remit such portion or portions as may be necessary to that end, and which she may consider, in good conscience, ought to be remitted. To hold otherwise would, we think, be construing the statute to place the plaintiff in this sort of an action at a disadvantage to plaintiffs in other forms of action. While the record does not affirmatively show that the trial court made a remission of a portion of the damages awarded a condition precedent to his overruling the motion for a new trial, the damages awarded being clearly excessive, we think it quite evident that, had the *remittitur* not been filed, the court would have granted the motion. A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the court. This doctrine is affirmed in the case of *Cattle Co. v. Mann*, 130 U. S. 74, 9 Sup. Ct. Rep. 458; also, in *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590. Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a *remittitur* should not be allowed, but a new trial should be granted. If they do not so

indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly. *Cattle Co. v. Mann*, cited above. From a review of the whole case, we cannot say that the jury, in finding for the plaintiff in this action in a sum largely in excess of the damages proven, deliberately disregarded the facts or the instructions of the court. We rather incline to the view that the jury, having found the issues in favor of the plaintiff, was then prompted, through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages largely in excess of what the proofs warranted.

The refusal of the trial court at the close of plaintiff's case to direct the jury to return a verdict for the defendant, at the request of defendant, is assigned as error. The deceased, Thomas Tomlinson, a merchant living in the village of Casa Grande, A. T., about nine o'clock in the evening of June 24, 1891, while crossing the railroad track of defendant, within the confines of said village, was struck by a passing freight engine, and died soon after from the injuries received. The testimony on the part of plaintiff tended strongly to show that at the time of the accident the train, which was a special freight, was running at a high rate of speed, and that, contrary to the custom of defendant, and in violation of the provisions of paragraph 322 of the Revised Statutes of 1887, no bell was rung, or other warning given of its approach. The village of Casa Grande extends along on each side of the defendant's track, which runs at this point in an east-and-west direction. South of the track, and facing it, is a row of dwellings, in one of which deceased was living, while north of the track are a number of business houses, one of which was the store of deceased. It was shown that the place where the deceased was struck was used as a crossing by him and the other residents living south of the track, in going to and from the north side. At this point there is the main track, and on each side a side-track. From the south side the view of the track to the east, from which direction the train which struck deceased was coming, was open and unobstructed for a considerable distance. On the north side, extending east from the place of the accident, for some distance along the side-track was a large

pile of lumber, high enough to hide an approaching train. Near the west end of this lumber-pile, two box-cars were standing on the north side-track. To the east of the lumber-pile, near the track, there is a house used as an office by the company owning the lumber. It was shown that, several minutes prior to the arrival of the train, deceased left his home, on the south side, to cross over to the north side. The theory of the plaintiff was, that deceased, on returning from the north side, was run into by the passing train. While none of the witnesses on the part of the plaintiff saw deceased at the time of the accident, there were circumstances shown which tended strongly to establish this theory as the correct one. One of the witnesses standing on the south side of the track, and about seventy-five feet from the crossing, was watching the approaching train until it stopped opposite him, and saw no one step on the track from the south side. It was also shown that the injuries received by the deceased were on the left side of the body. It was also shown that a flagstaff on the right side of the cowcatcher of the engine was broken off, and found near the body of the deceased. We think the case, as made out by the plaintiff, sufficient to justify the court in leaving the question of negligence on the part of the defendant to the determination of the jury, as well as the question of contributory negligence, or its absence, on the part of deceased.

Counsel for appellant urge in their brief that the request should have been granted for the reason that plaintiff fails to show due care and caution on the part of deceased in attempting to cross the track at the time of the accident. The rule in this territory, as declared by the supreme court in the case of *Lopez v. Mining Co.*, 1 Ariz. 464, 2 Pac. 748, is, that in actions for personal injuries, where contributory negligence is relied upon as a defense, due care and caution on the part of plaintiff, in the absence of affirmative proof to the contrary, will be presumed, and the burden of proving such contributory negligence rests upon defendant. The same rule has been applied by the supreme court of the United States. *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Horst*, 93 U. S. 291. In actions for damages in injuries causing death the same rule prevails as in ordinary actions for damages for personal injuries. We think the trial court very properly

denied defendant's request that the jury be directed to return a verdict for the defendant. We think the judgment should be affirmed, and it is so ordered.

Gooding, C. J., and Wells, J., concur.

MEMORANDUM DECISIONS.

[Civil No. 307.]

WILLIAM H. BARNES, Petitioner, v. THOMAS HUGHES,
Territorial Auditor, Respondent.

ORIGINAL APPLICATION for Writ of Mandamus.

[William H. Barnes, in *pro. per.*

William Herring, Attorney-General, for Respondent.

SLOAN, J.—This case is in all respects similar to the case of *Porter v. Hughes*, ante, p. 1, (just decided). The same statement of facts was argued to on this case as in *Porter v. Hughes*, and hence the decision of the latter case will control in the disposition of this case.

The plaintiff will therefore be granted the writ prayed for in his complaint.

Kibbey, J., and Wells, J., concur.

Filed January, 1893.

[Civil No. 352.]

ANDRE MAUREL, Plaintiff in Error, v. A. A. McDONALD
et al., Defendants in Error.

WRIT OF ERROR from the District Court of the Second Judicial District in and for the County of Gila. J. H. Kibbey, Judge.

Andre Maurel, in *pro. per.*

E. J. Edwards, for Defendant.

January 10, 1893. Dismissed.

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[Civil No. 356.]

JAMES H. WRIGHT, Petitioner, v. **THOMAS HUGHES**,
Auditor, Respondent.

ORIGINAL APPLICATION for a Writ of Mandamus.

Baker & Campbell, for Petitioner.

William Herring, Attorney-General, for Respondent.

January 12, 1893. Writ issued.

[Criminal No. 68.]

TERRITORY OF ARIZONA, Respondent, v. **JOHN DAVIS**,
Appellant.

APPEAL from the District Court of the First Judicial
District in and for the County of Pima. **R. E. Sloan**, Judge.

Allen R. English, and **W. M. Lovell**, for Appellant.

William Herring, Attorney-General, **Frank Hereford**, Dis-
trict Attorney, and **William H. Barnes**, and **J. H. Martin**, for
Respondent.

January 25, 1893. Affirmed.

[Criminal No. 67.]

TERRITORY OF ARIZONA, Respondent, v. **BAT-DISH-
BAK-ET-CTE GUADALUPI** et al., Appellants.

APPEAL from the District Court of the Second Judicial
District in and for the County of Gila.

W. H. Griffin, and **T. B. McCabe**, for Appellants.

J. D. McCabe, for Respondent.

January 25, 1893. Affirmed.

[Civil No. 341.]

GEORGE W. SWAIN, Appellant, v. COCHISE COUNTY,
Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge.

W. H. Stilwell, for Appellant.

William Herring, Attorney-General, and Allen R. English, District Attorney, for Appellee.

January 25, 1893. Affirmed.

[Civil No. 328.]

THE SAN PEDRO CATTLE COMPANY, Appellant, v.
G. M. WILLIAMS, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge.

Frank H. Hereford, for Appellant.

S. M. Franklin, for Appellee.

January 25, 1893. Affirmed.

[Civil No. 336.]

FRANK M. MAIN, Plaintiff in Error, v. F. CUEN, Defendant in Error.

WRIT OF ERROR from District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge.

Barnes & Martin, for Plaintiff in Error.

F. J. Heney, for Defendant in Error, and Jeffords & Franklin, of counsel.

PER CURIAM.—The only question sought to be presented in this case is as to the exclusion by the court of evidence proposed by plaintiff in error at the trial.

There is no statement of facts in the record, and the proposed evidence is not included in the bill of exceptions.

No briefs have been filed by either party, though the cause has been in this court for more than a year.

The record discloses no error.

The writ denied.

Gooding, C. J., Kibbey, J., Wells, J.

January 28, 1893.

[Civil No. 332.]

ARIZONA CENTRAL BANK, Appellant, v. E. H. WITHERELL, Appellee.

APPEAL from District Court of the Fourth Judicial District in and for the County of Yavapai. Henry C. Gooding, Judge.

Wilson & Norris, for Appellant.

Baldwin & Johnston, for Appellee.

April 14, 1893. Affirmed.

[Civil No. 359.]

JOHN G. CAMPBELL, Appellant, v. P. L. KASTNER et al., Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai. Edmund W. Wells, Judge.

J. F. Wilson, and L. H. Eggers, for Appellant.

Baldwin & Johnson, for Appellees.

April 14, 1893. Reversed.

[Civil No. 364.]

W. T. GRAY, Sheriff, et al., Appellants, v. GEORGE F. SPANGENBURG, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Henry C. Gooding, Judge.

H. N. Alexander, for Appellants.

Webster Street, and H. L. Wharton, for Appellee.

April 14, 1893. Affirmed.

[Civil No. 343.]

In the Matter of the Estate of JOHN D. WALKER, Deceased, Appellant, v. A. J. DORAN, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Joseph H. Kibbey, Judge.

A. C. Baker, and Fitch & Campbell, for Appellant.

Barnes & Martin, and S. M. Franklin, for Appellee.

April 14, 1893. Affirmed.

[Civil No. 355.]

CHARLES EDWARD LEWIS, Appellant, v. PIMA COUNTY, Appellee.

(“Narrow Gauge Railroad Bond Case.”)

APPEAL from the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge.

Barnes & Martin, for Appellant.

William M. Lovell, District Attorney, and C. W. Wright, for Appellee.

April 14, 1893. Affirmed.

Appeal to the United States Supreme Court. Affirmed.
155 U. S. 54, 39 Law Ed. 67.

[Civil No. 361.]

TERRITORY OF ARIZONA, Appellant, v. PERSONS, PROPERTY, LAND, AND REAL ESTATE, ETC., THE DELINQUENT TAX-LIST OF SAID COUNTY OF COCHISE FOR THE YEAR 1891, Appellee. SOUTHERN PACIFIC COMPANY, Objector.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge.

Allen R. English, for Appellant.

H. N. Alexander, for Appellee.

April 14, 1893. Affirmed.

[Civil No. 365.]

HENRY DIAL, Appellant, v. OSCAR OLSEN et al., Appellees.

APPEAL from District Court of the Second Judicial District in and for the County of Graham. Joseph H. Kibbey, Judge.

John W. Kobb, and Francis J. Heney, for Appellant.

R. E. Wilson, for Appellees.

April 15, 1893. Affirmed.

[Civil No. 340.]

**THE JACKSON COUNTY BANK, Appellant, v. CHARLES
F. AINSWORTH, Appellee.**

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa.

Hancock & Perley, for Appellant.

C. F. Ainsworth, for Appellee.

April 15, 1893. Dismissed.

[Civil No. 394.]

**In the Matter of the Application of WILLIAM H. BARNES
and JOHN O. DUNBAR for a Writ of Habeas Corpus.**

Benjamin Goodrich and Kibbey & Israel, for Petitioners.

**Francis J. Heney, Attorney-General, for the Territory of
Arizona.**

**November 8, 1893. William H. Barnes discharged; John
O. Dunbar remanded to sheriff of Pima County.**

[Civil No. 396.]

**In the Matter of the Application of JOHN O. DUNBAR for
a Writ of Habeas Corpus.**

William H. Barnes, Benjamin Goodrich, for Petitioner.

**Francis J. Heney, Attorney-General, for Territory of
Arizona.**

November 13, 1893. Petitioner discharged.

[Civil No. 397.]

In the Matter of the Application of FRANK M. KING for
a Writ of Habeas Corpus.

E. J. Edwards, for Petitioner.

Francis J. Heney, Attorney-General, for Territory of
Arizona.

November 21, 1893. Petitioner discharged.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1894.

[Civil No. 388. Filed January 10, 1894.]

[35 Pac. 984.]

CHARLES H. MEYER, Plaintiff and Appellant, v. WILLIAM H. CULVER, Defendant and Appellee.

1. **JUSTICE OF THE PEACE—TERM OF OFFICE—REV. STATS. ARIZ. 1887, PARS. 484, 1393, CITED AND CONSTRUED—PRECINCT OFFICER—ELECTION—TIE VOTE—HOLDING OVER—PARAGRAPHS 484 AND 1393 NOT REPEALED BY LAWS ARIZ. 1891, ACT NO. 47, WHICH AMENDS REV. STATS. ARIZ. 1887, PAR. 467.**—The term of a justice of the peace is two years, and until his successor is elected and qualified. Par. 1393, *supra*. All county and precinct officers shall hold office until their successors are elected and qualified. Par. 484, *supra*. A justice of the peace is a precinct officer; and where the incumbent of the office is a candidate for re-election, it is necessary that another candidate should receive more votes than he to fill the office by election. Where there is a tie vote, the election of a successor to the office is prevented, and the incumbent will hold over under his former commission. Paragraphs 484 and 1393, *supra*, were not repealed by act No. 47, *supra*. That act only amended paragraph 467, *supra*.

2. **SAME — BOARD OF SUPERVISORS — POWER TO APPOINT — VACANCY. —** Where there is no vacancy in the office of the justice of the peace, an appointment to such office by the board of supervisors is void.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

S. M. Franklin, for Appellant.

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Heney & Ford, for Appellee.

ROUSE, J.—This suit was instituted by appellant against appellee to try the title to the office of justice of the peace, under the provisions of title 62 of the Revised Statutes of 1887. Precinct No. 1, Pima County, is entitled to two justices of the peace. Justices of the peace, in this territory, are elected for a term of two years. At the general election in 1890, M. R. Slater and the appellee were elected justices of the peace for said precinct No. 1, and on the 1st of January thereafter received their commissions according to law, and duly qualified and entered into the possession of said offices. At the general election in 1892 they were candidates for re-election, and at the same time W. F. Scott, C. A. Elliott, and the appellant were candidates for said offices. The votes cast for said offices were divided among the five candidates as follows: Scott, 368 votes; Culver, 303 votes; Meyer, 303 votes; Slater, 255 votes; Elliott, 224 votes. The board of canvassers declared that Scott was elected, and they further declared that, by reason of the tie between Meyer and Culver, neither of them was elected. The board of supervisors, at the meeting in January, 1893, duly commissioned Scott, and, acting on the theory that only one justice of the peace had been elected, and there was a vacancy, appointed and commissioned the appellant to fill said vacancy. After Scott received his commission and qualified, he received the books and papers pertaining to the office of justice of the peace from Slater, and entered upon the discharge of the duties of said office. After Meyer was appointed and commissioned by the board of supervisors, he demanded the books and papers of the office of justice of the peace from appellee, but Culver refused to give them up, and continued in the discharge of the duties of said office. Appellant then commenced this action, and in his complaint alleged, substantially, the foregoing facts. Appellee demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the judgment of the court sustaining the demurrer is the only question presented to us by this appeal.

The precinct mentioned was entitled to two justices of the peace. In this territory the term of office of a justice of the

peace is two years, and until his successor is elected and qualified. Rev. Stats., par. 1393. It is also provided that "all county and precinct officers shall hold office until their successors are elected and qualified." Rev. Stats., par. 484. A justice of the peace is a precinct officer. The appellee, William H. Culver, and Slater, having been elected justices of the peace for said precinct No. 1 at the general election in 1890, and having been commissioned as such in January, 1891, their terms of office were for a period of two years, and until their successors were elected and qualified. Each, therefore, would hold his office until January, 1893, and until his successor was elected and qualified. At the general election in 1892, of the five candidates for the office of justice of the peace for said precinct, Scott was the only one that was elected. He received more votes than any other candidate, and therefore was entitled to one of said two offices. It only remains for us to determine who is entitled to the other office. To fill the two offices by election, it was necessary that two persons should receive more votes than any other candidate. Therefore, before Culver or Slater would lose his office, two persons would have to receive more votes than any other. As to Slater, such was the result. Scott, Meyer, and Culver received more votes than he. As to him, a successor was elected. But as to Culver, no two persons received more votes than he. The tie between him and Meyer prevented an election of his successor, and he will hold over under his former commission. Paragraphs 484 and 1393 were not repealed by act No. 47 of the Laws of 1891. That act amended paragraph 467, but in no way affects the two paragraphs last mentioned. The appointment of appellant by the board of supervisors was void, for the reason that there was no vacancy. The demurrer to the complaint was properly sustained, and the judgment of the district court is affirmed.

Baker, C. J., and Hawkins, J., concur. Sloan, J., not sitting.

[Criminal No. 87. Filed January 10, 1894.]

[36 Pac. 38.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
ZACK BOOTH et al., Defendants and Appellants.**

1. **CRIMINAL LAW—BURGLARY—EVIDENCE—SUFFICIENCY.**—Evidence on a trial of appellants, three Booth brothers, jointly indicted for burglary, that flour stored in a house was taken without the owner's knowledge or consent; that a cart with flour scattered over it had been tracked from where the flour had been stolen to the gate of the father of appellants; that flour was seen stacked up in the house of the father; that Zack Booth was seen there shortly after; that on the night of the burglary the appellants were in town, and two of the brothers spent the night at their homes, but Zack was away some three hours, and afterwards "joshed" about having taken the flour, and told one witness but one man knew anything about it, and threatened witness that he would do him up if he said anything about what had been talked of, is sufficient to justify the jury in convicting Zack Booth.
2. **SAME—SAME—JOINT INDICTMENT—EVIDENCE—SUFFICIENCY AS TO ONE AND WANT OF EVIDENCE AS TO OTHERS.**—Where the evidence is sufficient to support a verdict of conviction as against one of three brothers jointly indicted for the crime of burglary, but there is no evidence connecting either of the others with the commission of the offense, the judgment of the trial court will be affirmed as to the one, and reversed and the case remanded for a new trial as to the others.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Affirmed as to Zack Booth. Reversed as to Nick and John Booth.

The facts are stated in the opinion.

E. J. Edwards, for Appellant.

Francis J. Heney, Attorney-General, for Respondent.

HAWKINS, J.—The appellants were jointly indicted for the crime of burglary, and were tried at the October term of said district court, and convicted of the crime of burglary in

the first degree. Appellants filed a motion for a new trial, which was overruled, and this appeal was taken from the judgment of conviction, and also from the order overruling the motion for a new trial, and a reversal is asked on the single ground that the evidence is insufficient to support the verdict of the jury. This requires us to review the testimony in the case. The evidence is all circumstantial, and discloses the fact that one thousand pounds of flour was stored in James Callahan's house in Payson, on February 22, 1893, by McDonald, and that the same was taken, without the owner's knowledge or consent, between February 28 and March 2, 1893. A cart with flour scattered over it was found at Piper's stable, in Payson, after it had been tracked from where the flour was stolen to the gate of old man Booth, the father of appellants,—a distance of about six miles. One witness saw flour stacked up in old man Booth's house. Zack Booth was seen there shortly after. The testimony further discloses that on the night of the disappearance of the flour the appellants were in Payson at a party. Nick and John Booth, after the party broke up, went home with their families. Zack slept at Payson with witness Gibson, who says, when he went to bed, Zack went out, saying, "I will be back pretty soon." Witness went to sleep, and Zack returned some time afterwards—probably two or three hours—and woke up witness. The evidence also shows that Zack talked quite freely about taking the flour—always, as one witness expressed it, "in a 'joshing' way." We also find him at one witness's house saying to said witness "that the Booths are accused of taking the flour; that there was but one man who knew anything they said or done; that he would do somebody up; and that he would do witness up if he (witness) said anything about what had been talked of." We cannot but conclude that these facts strongly tend to connect Zack Booth with the commission of the offense; and the jury, having heard the evidence and passed upon the same, and considered all the circumstances in the case, was justified in finding Zack Booth guilty of burglary in the first degree. There being sufficient evidence to support the verdict, we are not authorized in disturbing the same. *People v. Ah Loy*, 10 Cal. 301. There is no evidence connecting Nick and John Booth with the commission of the offense. The judgment of the lower

court is therefore, as to Zack Booth, affirmed, and as to Nick and John Booth, reversed, and remanded for a new trial.

Baker, C. J., and Sloan, J., concur.

[Civil No. 379. Filed January 11, 1894.]

[36 Pac. 170.]

NAT HAWKE, Clerk of Board of Supervisors, et al., Defendants and Appellants, v. JAMES P. McALLISTER, Plaintiff and Appellee.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—FAILURE TO FILE IN DUE TIME—LAWS ARIZ. 1893, ACT 9.—Where a case has been tried more than ten days before the end of the term, and the bill of exceptions has not been filed before the end of the term, it cannot be considered a part of the record. Statute, *supra*.
2. SAME—JURISDICTION—NOTICE OF APPEAL—BOND—DISMISSAL—FUNDAMENTAL ERROR—REV. STATS. ARIZ. 1887, PARS. 937, 945, CITED.—Where the bill of exceptions cannot be considered, a notice of appeal having been given and an appeal-bond having been executed, the appeal cannot be dismissed, but the court must examine the errors, if any, that go to the foundation of the action.
3. OFFICE AND OFFICERS—BOARD OF SUPERVISORS—MANDAMUS TO COMPEL OTHER MEMBERS TO RECOGNIZE DULY ELECTED SUPERVISOR—PLEADING—SUFFICIENCY OF COMPLAINT—REV. STATS. ARIZ. 1887, PARS. 2335, 2336, CITED.—An affidavit for a writ of *mandamus* setting forth in effect that plaintiff was a duly elected and qualified member of a board of supervisors, and had assumed his duties as such member, and that defendants, other members of the board, and the clerk refused to recognize him as such member, but passed a resolution declaring him not a member, and electing another to his place, and were preventing him from acting as such officer, and would continue to so prevent him from acting, states a cause of action. Rev. Stats., *supra*, cited.

SLOAN, J., concurring specially.

4. OFFICE AND OFFICERS—BOARD OF SUPERVISORS—POWER TO PASS ON ELIGIBILITY OF MEMBERS—DE FACTO MEMBERS—RIGHT TO WRIT OF MANDAMUS TO COMPEL ADMISSION TO OFFICE.—The board of supervisors have no power to pass upon the eligibility of its members. A *de facto* member is entitled to recognition as such by the other members and clerk of the board, and has a right to the writ of *mandamus* to compel such recognition.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

William Herring, and F. J. Heney, for Appellants.

Allen R. English, and W. H. Stilwell, for Appellee.

ROUSE, J.—This case was tried and judgment rendered May 29, 1893. Motion for new trial was made and overruled on date of the judgment; a notice of appeal given, and bond on appeal executed, on same date of the judgment. The court adjourned the term on September 9, 1893, and on September 18, 1893, a bill of exceptions was delivered to the clerk by counsel for appellant; and two days thereafter the judge signed and settled said bill, against the objections of counsel for appellee.

The case having been tried more than ten days before the end of the term, and the bill of exceptions not having been filed before the end of the term, it cannot be considered as a part of the record. Laws 1893, act 9; *Hand v. Ruff*, 3 Ariz. 175, 24 Pac. 257; *Gila R. I. Co. v. Wolfley*, 3 Ariz. 176, 24 Pac. 257; *Sweet v. Perkins*, 24 Fed. 777; *Salt River Canal Co. v. Hickey*, *post*, p. 240, 36 Pac. 171. A notice of appeal having been given, and an appeal-bond having been executed, the appeal cannot be dismissed; but we are compelled to examine the record, and consider the errors, if any, that go to the foundation of the action. Rev. Stats., pars. 937, 945; *Ran-kert v. Clow*, 16 Tex. 9; *Hollingsworth v. Holshousen*, 17 Tex. 47; *Salt River Canal Co. v. Hickey*, *supra*. The only question thus presented is the decision of the court overruling the motion to dismiss the proceedings, which, in effect, was a demurer to the complaint on the grounds that it did not contain facts sufficient to constitute a cause of action.

On April 19, 1893, appellee, plaintiff below, presented his complaint in the form of an affidavit for a *mandamus* against appellants, defendants below, Nat Hawke, W. K. Perkins, E. A. Nichols, and Frank Hare, to compel them to do certain things enumerated. The facts set forth in said affidavit are

to the effect that, at the general election in 1890, Scott White was elected a supervisor of Cochise County for a term of four years, beginning January 1, 1891, and that he duly qualified, and entered upon the discharge of the duties of said office, and continued to discharge the duties of said office until about January 15, 1893; that at the general election in 1892 plaintiff and defendant Perkins were duly elected supervisors of said county for the term of two years, beginning January 1, 1893, and that they duly qualified, and entered upon the discharge of the duties thereof; that on the third day of January, 1893, said board of supervisors organized with White as chairman, and plaintiff and Perkins as members, and duly elected defendant Hawke clerk of said board; that plaintiff continued in the discharge of the duties of his said office until the ninth day of January, 1893; that about the date last mentioned, while plaintiff was in the discharge of the duties of said office, and anxious and willing to continue to do so, White and Perkins, without plaintiff's consent, passed a resolution declaring plaintiff not a member of said board, and proceeded to pass a resolution electing defendant E. A. Nichols a member of said board in place of plaintiff, and said Nichols from that time has been acting and attempting to act as a member of said board; that from the date last mentioned said White and Perkins, as members of said board, and said Hawke, as clerk of said board, refused to recognize plaintiff as a member of said board, but did recognize said Nichols as a member thereof instead and in the place of plaintiff; that thereafter, about the ——— day of January, 1893, White resigned as a member of said board, and qualified as sheriff of said county, to which office he had been elected at the general election in 1892; that on the twelfth day of January, 1893, said Perkins and Nichols attempted to appoint and elect Frank Hare as a member of said board of supervisors in the place of White, who had resigned; that said Hawke, from and after the date of his election as clerk of said board, and at this date, is the custodian of the records and books of the said board, and qualified to enter therein the proceedings of said board; that from and after the appointment of said Nichols the said White and Perkins and the said Hawke refused to recognize plaintiff as a member of said board, and refused to record his acts as a member thereof;

that after the resignation of said White, and the appointment of said Hare, the said parties refused to recognize plaintiff as a member of said board, and refused to record his acts as a member thereof, and still refuse to recognize him as a member and to record his acts as such. The affidavit further averred that said board of supervisors would meet at an early date thereafter, and that said parties would continue to refuse to allow plaintiff to act as a member of said board, and to record his acts as such.

The allegations contained in the said affidavit constituted a cause of action. Rev. Stats., pars. 2335, 2336. Indeed, it would be difficult to create a state of facts, if one should be permitted to choose his own materials for that purpose, to make a stronger case. An examination of the answer discloses the reasons for the actions of the defendants, which would otherwise be reprehensible. The judgment should be affirmed, and it is so ordered.

Hawkins, J., concurs.

Baker, C. J., did not take part in this case.

SLOAN, J.—While concurring, I deem it necessary, in order to more clearly present my views of the case, to add something to the foregoing opinion. The complaint shows that the plaintiff, whether eligible to the office of supervisor or not, received his certificate of election, and thereafter qualified under the law and assumed the duties of the office. He became thereby at least a *de facto* officer. The statutes do not confer upon the board of supervisors authority to pass upon the eligibility of its members, nor to declare a vacancy by reason of the ineligibility of any member. There was therefore no power in the remaining members of the board to declare a vacancy by reason of McAllister's ineligibility, and their act in electing Nichols to fill such assumed vacancy was utterly void. Such a void act could not operate to oust McAllister from his office. Nor did Nichols become by such act, and by the recognition of the other members of the board, a *de facto* supervisor. He was a mere usurper. McAllister still remained a *de facto* member of the board. If McAllister was the *de facto* officer, he was entitled to recognition as such by

the other members and by the clerk of the board, and had a right to the writ to compel such recognition. *In re Delgado*, 140 U. S. 586, 11 Sup. Ct. Rep. 874.

[Criminal No. 88. Filed January 12, 1894.]

[35 Pac. 1060.]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
HARRY HANCOCK, Defendant and Appellant.

1. CRIMINAL LAW—AGGRAVATED ASSAULT—INSTRUCTIONS—PREMEDITATED DESIGN—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 390, SUBD. 6, CITED.—An instruction that if the defendant made an assault upon the complaining witness with a deadly weapon, the jury might find him guilty of an aggravated assault is error, it failing to include the element of "premeditated design" necessary to constitute the offense under statute, *supra*.
2. SAME — SAME — SAME — READING STATUTORY DEFINITION — UNITED STATES v. ROMERO, *Post*, p. 193, FOLLOWED.—The reading of the statute defining the offense does not cure an erroneous instruction as to the elements of the crime. *United States v. Romero, supra*, followed.
3. SAME—INSTRUCTIONS—READING STATUTE—RELEVANCY TO EVIDENCE—MISLEADING.—The reading of the whole section of the statute defining seven different circumstances under which a crime may be committed, many of which have no reference whatever to the evidence in the case, is error, as instructions should have some reference to the case made by the evidence; otherwise, they are calculated to confuse and mislead.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

E. J. Edwards, for Appellant.

The court charged the jury as to what constituted an assault with intent to commit murder, an assault with a deadly weapon, a simple assault, and an aggravated assault. The court charged on all seven of the circumstances under which

an assault might become aggravated, and in this the appellant claims error was committed.

If one circumstance had been alleged, it would have been error to charge on all or any of the others. *Kouns v. State*, 3 Tex. App. 13; *Ferguson v. State*, 4 Tex. App. 156; *McGregor v. State*, 4 Tex. App. 599; *Kennedy v. State*, 9 Tex. App. 399; *Hunt v. State*, 9 Tex. App. 404; *Reid v. State*, 9 Tex. App. 472; *Clubb v. State*, 14 Tex. App. 192.

The charge was calculated to mislead and cause the jury to consider other and different matter from that for which the defendant was indicted, as constituting the offense. The jury were told that there were seven different circumstances under which an assault might become aggravated, and the charge left them to speculate as to what one they would apply to the evidence.

Francis J. Heney, Attorney-General, for Respondent.

BAKER, C. J.—The appellant was indicted for assault with intent to commit murder, and convicted of an aggravated assault. The following instruction was given for the prosecution, the giving of which is assigned as error: “If you believe from the evidence beyond a reasonable doubt that the defendant, at any time within the time specified,—within five years next before the finding of the indictment,—made an assault upon Mrs. Huberkorn with a deadly weapon, then you might find by your verdict the defendant guilty of an aggravated assault.” The charge in the indictment is, that the assault was made with a deadly weapon, and this instruction was doubtless drawn and given as if authorized by subdivision 6 of section 390 of the Penal Code, being one of seven circumstances under which the aggravated assault may be committed, which reads as follows: “When committed with a premeditated design and by use of means calculated to inflict great bodily injury.” But there is an entire absence in the instruction of any reference to the “premeditated design” necessary to constitute the offense under this subdivision. The jury were told, in effect, that if the defendant made the assault with a deadly weapon, he was guilty of the offense of an aggravated assault, whether done with or without “premeditated design.” The reading of the statute did

not cure the defect. This we decided in the case of *United States v. Romero, post*, p. 193, 35 Pac. 1059. The whole of section 390 of the Penal Code was read to the jury. This defines no less than seven different circumstances under which an aggravated assault may be committed, many of which have no reference whatever to the evidence in this case. Instructions ought to have some slight reference to the case made by the evidence. *People v. Roberts*, 6 Cal. 217. An instruction having no reference to the evidence is calculated to confuse and mislead. *Amann v. Lowell*, 66 Cal. 307, 5 Pac. 363. The judgment is reversed, and a new trial granted.

Sloan, J., and Hawkins, J., concur.

Rouse, J., not sitting.

[Civil No. 413. Filed January 16, 1894.]

[37 Pac. 470.]

D. S. THOMAS, Plaintiff and Appellant, v. J. M. LANE et al., Defendants and Appellees.

1. APPEAL AND ERROR—MOTION TO AFFIRM—WANT OF ASSIGNMENT OF ERRORS—REV. STATS. ARIZ. 1887, PAR. 940, AND PUTNAM v. PUTNAM, 3 ARIZ. 182, 24 PAC. 320; GILA R. I. CO. v. WOLFLEY, 3 ARIZ. 176, 24 PAC. 257; AND UNITED STATES v. TIDBALL, 3 ARIZ. 384, 29 PAC. 385, CITED AND FOLLOWED.—A motion to affirm the judgment of the lower court on the ground that there is no assignment of errors filed will be granted, no fundamental error, of which this court takes notice without a formal assignment of errors, appearing on the face of the record. Statute, *supra*, and cases, *supra*, cited and followed.

DISMISSED, with costs, pursuant to the tenth rule. 41 L. Ed. 1177.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

Francis J. Heney, for Appellant.

W. R. Stone, and Kibbey & Israel, for Appellees.

Section 940 of the Civil Code (Rev. Stats. 1887) provides that in all cases the appellant or plaintiff in error shall file with the clerk of the court below an assignment of errors, distinctly specifying the grounds on which he relies, and all errors not so distinctly specified shall be considered by the supreme court as waived. This statute has been construed by this court in *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320; *Gila R. I. Co. v. Wolfley*, 3 Ariz. 176, 24 Pac. 257; and *United States v. Tidball*, 3 Ariz. 384, 29 Pac. 385. What is meant by fundamental error, of which this court will take notice without a formal assignment of errors, is that which goes to the jurisdiction of the court below, either of the person of the defendant or the subject-matter of the action, or such that would preclude the judgment plaintiff from a recovery at all. No such error appears in the record of this case.

HAWKINS, J.—Appellees moved to affirm the judgment for several reasons, viz.: 1. That there is no bill of exceptions filed; 2. No statement of facts filed; 3. No assignment of errors was filed. An examination of the record discloses the fact that no assignment of errors was filed. We do not think it necessary to examine as to the other defects. Paragraph 940 of the Revised Statutes of 1887 provides that in all cases the appellant or plaintiff in error shall file with the clerk of the court below an assignment of errors distinctly specifying the grounds on which he relies, and all errors not so distinctly specified shall be considered by the supreme court as waived. The statute is conclusive of the question, and has often been construed by this court. *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320; *Gila R. I. Co. v. Wolfley*, 3 Ariz. 176, 24 Pac. 257; *United States v. Tidball*, 3 Ariz. 384, 29 Pac. 385. No fundamental error of which this court takes notice without a formal assignment of errors appears on the face of the record. The court appears to have had jurisdiction of the subject-matter and of the parties to the action, and the pleadings warrant the judgment. The judgment is affirmed.

Baker, C. J., and Sloan, J., concur.

[Civil No. 385. Filed January 16, 1894.]

[36 Pac. 499.]

BELLA A. CARROLL, Plaintiff and Appellant, v. JOHN BYERS et al., Defendants and Appellees.

1. NEW TRIAL—MOTION FOR OVERRULED BY OPERATION OF LAW AT EXPIRATION OF TERM WHEN FILED—HAND v. RUFF, 3 ARIZ. 175, 24 PAC. 257, FOLLOWED.—A motion for a new trial is overruled, by operation of law, at the expiration of the term at which it is made. *Hand v. Ruff, supra*, followed.
2. APPEAL AND ERROR—FINAL JUDGMENT—ORDERS REVIEWABLE—TIME FOR TAKING APPEAL—REV. STATS. ARIZ. 1887, PARS. 593, 846, CITED AND CONSTRUED.—An appeal from a final judgment carries with it jurisdiction to review all orders affecting the judgment, including an order refusing a new trial, and until final judgment is entered the aggrieved party is not required to take his appeal. Statutes, *supra*, cited and construed.
- HAWKINS, J., and ROUSE, J., concurring specially.
3. SAME—RECORD—BILL OF EXCEPTIONS—NECESSITY FOR TO SECURE REVIEW OF RULING ON MOTION FOR NEW TRIAL.—Where no bill of exceptions is preserved to the action of the trial court in overruling the motion for a new trial, such ruling cannot be reviewed.
4. SAME—AFFIDAVIT IN LIEU OF BOND—REV. STATS. ARIZ. 1887, PAR. 860, CITED—JURISDICTION.—An affidavit in lieu of an appeal-bond, under statute, *supra*, made before the probate judge, sufficient in form, and containing the necessary averments of fact which, if true, show appellant's inability to pay the costs, if not contested, is all that is necessary, in addition to the notice of appeal, to give this court jurisdiction.
5. SAME—RECORD—RECITALS IN JUDGMENT—NECESSITY FOR BILL OF EXCEPTIONS—EXCEPTIONS SAVED BY REV. STATS. ARIZ. 1887, PAR. 827.—Although there is no bill of exceptions, a recital in the judgment that the verdict followed by the judgment was found by the concurrence of nine jurors only puts that fact in the record, and under statute, *supra*, no bill of exceptions was necessary to reserve an exception thereto.
6. CONSTITUTIONAL LAW — JURY — THREE-FOURTHS VERDICT — COMMON-LAW CASES, LAWS ARIZ. 1891, P. 71, INVALID AS TO—CONFLICTS WITH REV. STATS. U. S., SEC. 1868, AND CONSTITUTION, 7TH AMENDMENT.—The statute, *supra*, providing for a three-fourths verdict in all civil cases and in all misdemeanor cases, in so far as it applies to cases cognizable at common law, is invalid, because in conflict with section 1868 of the Revised Statutes of the United States, which provides

that "No party shall be deprived of the right of trial by jury in cases cognizable at common law," and also in conflict with the seventh amendment to the constitution, providing that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved."

7. JURY—TRIAL BY DEFINED.—By the term "trial by jury" is meant trial by jury in the general manner as practiced at common law. At common law a lawful jury was composed of twelve jurors, and the unanimity of these twelve members in finding a verdict was an essential attribute.

8. CLAIM AND DELIVERY—COMMON-LAW ACTION.—The action termed "claim and delivery" is the same in all essential attributes as the ancient common-law remedy of replevin, and is a modification of that action, and not in derogation thereof.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. H. C. Gooding, Judge. Reversed.

The facts are stated in the opinion.

C. F. Ainsworth, for Appellant.

This being a common-law action for the recovery of personal property, it was error for the court to allow the verdict, rendered in favor of either party to said action and signed by only nine jurors, to stand. The act of the legislative assembly of 1891 (pp. 71, 72), in so far as it applies to the circumstances developed in this case, is unconstitutional and void. *Kleinschmidt v. Dunphy*, 1 Mont. 118; *State v. McLean*, 11 Nev. 39.

Fitch & Campbell, for Appellees.

SLOAN, J.—The record of this case shows that appellant, Bella A. Carroll, by complaint filed April 14, 1890, in the district court of Maricopa County, brought suit in claim and delivery against appellees, John Byers and W. T. Gray, for the possession of certain horses, wagons, and other articles of personal property. After issue was joined by appellees, the case was set for trial May 23, 1891. On the last-mentioned date the case was tried before a jury. On May 25, 1891, the jury returned a verdict for appellees. This verdict was signed by nine of the jurors only. The verdict thus

signed and returned was entered upon the minutes of the court. No judgment or order for judgment was made or entered in the cause during the term at which the trial was had. On May 26, 1891, and during the term, appellant filed her motion for a new trial. This motion was not acted upon during the term; and the court seems to have held it under advisement until May 23, 1893, when an order was entered overruling the motion. On the same day the court gave judgment against appellant and her sureties upon her claim bond for the costs of the action. This judgment recited the verdict of May 25, 1891, signed by the nine jurors, and was based upon it. Appellant, in open court, gave notice of appeal from this judgment, and on June 20, 1893, made, and filed with the clerk of said district court, an affidavit in lieu of an appeal-bond.

We are asked by counsel for appellees to dismiss this appeal for the reason that it was not taken within the time prescribed by the statute. The motion for a new trial was overruled, by operation of law, at the expiration of the term at which it was made. *Hand v. Ruff*, 3 Ariz. 175, 24 Pac. 257. The contention of counsel is therefore that an appeal should have been taken from this order, and should have been perfected within twenty days after the term. As was pointed out in *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649, our statutes upon the subject of appeals are somewhat indefinite. Paragraph 593 of the Revised Statutes confers, among other things, jurisdiction upon this court to review upon appeal "an order granting or refusing a new trial." Again, paragraph 846 provides: "An appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases." Whether paragraph 593 is to be construed as giving the right of appeal directly from an order overruling a motion for a new trial or not, we think there can be no question but that the appeal from the judgment carries with it jurisdiction to review all orders affecting the judgment, including an order refusing a new trial, and that until final judgment is entered the aggrieved party is not required to take his appeal. In this case the judgment rendered by the court May 25, 1893, was a final judgment, and an appeal lay from it to this court. The notice of appeal was given during the term at which it was entered.

and the affidavit in lieu of bond filed within twenty days after this term. As no bill of exceptions was taken to the action of the court in overruling the motion for a new trial, we cannot of course review this ruling, but we have still ample jurisdiction to review the judgment, and, in connection therewith, all questions properly presented upon the whole record.

We are also asked to dismiss this appeal upon the further ground, as alleged, that the affidavit in lieu of an appeal-bond does not conform to the requirements of paragraph 860 of the Revised Statutes. The affidavit was made before the probate judge of Maricopa County, as authorized, and is sufficient in form, and contains the necessary averments of facts which, if true, show appellant's inability to pay the costs. It was not contested, and hence, when filed, was all that was necessary, in addition to the notice of appeal, to give this court jurisdiction.

The judgment followed the verdict, and recited that it had been found by the concurrence of nine jurors only. Although there is no bill of exceptions in the record, the recital in the judgment that the verdict was thus found puts that fact in the record; and hence, by paragraph 827 of the Revised Statutes, no bill of exceptions was necessary to reserve an exception thereto. The record upon this appeal presents, therefore, the question whether or not in this form of action unanimity is required of the jury to return a valid verdict. Section 1 of an act passed by the legislature, and approved March 17, 1891, (Sess. Laws 1891, p. 71,) provides that "In all trials of civil cases and in all trials of misdemeanors in the courts of the territory where a jury of twelve persons shall be impaneled to try such cases, the concurrence of three fourths of such jury shall be sufficient to render a verdict therein. And in all such jury trials when the said jury of twelve persons shall unanimously agree upon a verdict, said verdict shall be signed by the foreman thereof and returned into court; but when such jury do not unanimously agree upon a verdict, but three fourths thereof do agree, then three fourths of such jury shall sign the verdict so agreed upon by them and notify the court of such fact, and thereupon all of said jury shall be returned into court and shall then deliver to the court the verdict so signed by three fourths of such jury, and

the court shall receive and cause to be read and recorded such verdict in the case, and judgment shall be entered thereon as in other cases now provided by law." This act, in so far as it applies to cases cognizable at common law, must be held invalid, because in conflict with section 1868 of the Revised Statutes of the United States, which authorizes in the territories a commingling of common-law and chancery jurisdictions in the territorial courts and a uniform course of proceeding in all cases, legal or equitable, and provides also (Supp. Rev. Stats., p. 13), "No party shall be deprived of the right of trial by jury in cases cognizable at common law." It is also in conflict with the seventh amendment to the constitution, providing that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." By the term "trial by jury" is meant trial by jury in the general manner as practiced at common law. Cooley on Constitutional Limitations, 394. At common law a lawful jury was composed of twelve jurors, and the unanimity of these twelve members in finding a verdict was an essential attribute. 3 Blackstone's Commentaries, 376; Proffatt on Jury Trials, sec. 77. It remains, therefore, for us to determine whether this case is of the class of cases which are cognizable at common law. The action is one termed in our statute "claim and delivery." This action is, in all essential attributes, the same as the ancient common-law remedy of replevin. Similar statutes exist in other states and territories; and these are uniformly held to be modifications of the common-law action of replevin, and not statutory remedies in derogation thereof. *Ellingboe v. Brakken*, 36 Minn. 156, 30 N. W. 659; *Gist v. Loring*, 60 Mo. 487; *Scofield v. Whitelegge*, 49 N. Y. 259. It is apparent, therefore, from the record that appellant has been deprived of her right to a trial by a jury by the acceptance of the verdict of nine jurors. The judgment, therefore, must be reversed, and a new trial granted; and it is so ordered.

Baker, C. J., did not take part in this case.

HAWKINS, J.—I concur in the judgment, but do not agree with the reasoning in *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649,—that our statutes on the subject of appeal

are indefinite. Our statute on appeal seems to be perfectly plain. An appeal or writ of error may be taken thereunder, in my opinion, from any final judgment of the district court rendered in civil cases where jurisdiction of appeal is given. Jurisdiction to review on appeal is plainly set out in paragraph 593 of the Revised Statutes of 1887. Paragraph 846 of the Revised Statutes can mean nothing else than "An appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases," as provided in paragraph 593.

ROUSE, J.—I agree with Justice Hawkins's concurring opinion.

[Civil No. 414. Filed January 16, 1894.]

[36 Pac. 33.]

THE CAÑADA DEL ORO MINES, LIMITED, and J. DEWITT STURGESS, Manager, Defendants and Appellants, v. HORACE F. COLLINS, by GEORGE J. ROSKRUGE (his best friend), Plaintiff and Appellee.

1. APPEAL AND ERROR—AMOUNT IN CONTROVERSY—APPEAL FROM JUSTICE COURT—REV. STATS. ARIZ. 1887, PAR. 1452, CONSTRUED—APPEAL FROM DISTRICT COURT—REV. STATS. ARIZ. 1887, PARS. 592, 593, CONSTRUED.—No appeal will lie from a justice court, unless the amount in controversy exceeds twenty dollars, exclusive of costs. Par. 1452, *supra*, construed. And no appeal from a case commenced in justice court will lie from a judgment of the district court unless the judgment exceeds one hundred dollars. Par. 592, *supra*, construed. The appellate jurisdiction of the supreme court is limited to cases originating in the district court where the amount exceeds two hundred dollars. Par. 593, *supra*, construed.
2. SAME—JURISDICTION—SUPREME COURT—REV. STATS. ARIZ. 1887, PAR. 846, CONSTRUED—HISTORY CO. v. DOUGHERTY, 3 ARIZ. 387, 29 PAC. 649, DISAPPROVED.—Paragraph 846, *supra*, providing that an appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases, must be construed to give the right of appeal in cases within the jurisdiction of the supreme court, and not otherwise. *History Co. v. Dougherty*, *supra*, disapproved.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Dismissed.

The facts are stated in the opinion.

F. H. Hereford, for Appellants.

William M. Lovell, for Appellee.

ROUSE, J.—This was an action instituted before a justice of the peace by appellee against appellants, to recover a balance on an account of \$68.80. Judgment was rendered thereon in favor of appellee for said sum of \$68.80, and for the costs of the suit, amounting to and taxed at \$24.40; making a total of \$93.20. From said judgment appellants appealed the case to the district court of Pima County, and on a trial anew therein a jury returned a verdict for \$68.80, and a judgment was duly entered thereon in favor of appellee for \$68.80, and for costs, and the costs were taxed at \$61.30. The appellee asks that the appeal be dismissed, for the reason that this court has no jurisdiction of the case. Paragraph 1452 of the Revised Statutes of 1887 is as follows: "1452 (Sec. 60). Any party to a final judgment in the justice's court may appeal therefrom to the district court, where such judgment, or the amount in controversy, shall exceed twenty dollars, exclusive of costs, and in such other cases as may be expressly provided by law." The district court had no original jurisdiction of this case, for the reason that the amount was less than one hundred dollars. The only way, therefore, that this case could be heard in the district court was through an appeal from the justice's court. Paragraph 602 (sec. 3) and paragraph 603 (sec. 4) of the Revised Statutes define the jurisdiction of the district courts, and are as follows: Paragraph 602 (sec. 3): "Their original jurisdiction shall extend to all civil cases where the amount exceeds one hundred dollars, exclusive of interest." Paragraph 603 (sec. 4): "The appellate jurisdiction of these courts shall extend to hearing upon appeal: . . . 1. All actions from courts of justices of the peace which shall be returned therein agreeably to law." It is also provided that cases brought up to said district courts by appeal, etc., shall be tried *de novo*. Rev.

Stats., par. 760, sec. 12. The jurisdiction of the supreme court, as fixed by the statute, is as follows: Paragraph 592 (sec. 2): "The supreme court shall have appellate jurisdiction in all cases where the matter in dispute exceeds one hundred dollars." Paragraph 593 (sec. 3): " . . . To review upon appeal: . . . 1st. A judgment in an action or proceeding commenced in the district court, when the matter in dispute exceeds two hundred dollars, . . . or brought into that court from another court." Thus it will be observed that no appeal will lie from a justice court to the district court, unless the amount in controversy exceeds twenty dollars, exclusive of costs; and that no appeal from a case commenced in a justice court will lie from the judgment of the district court unless the judgment exceeds one hundred dollars; that the appellate jurisdiction of the supreme court is limited to cases originating in the district court where the amount exceeds two hundred dollars. Hence the jurisdiction of the supreme court depends upon two different amounts, viz.: First, in cases originating in justices' courts, and appealed therefrom to the district court, where the amount of the judgment of the district court exceeds one hundred dollars; and second, in cases commenced in the district court, where the amount exceeds two hundred dollars. Paragraph 846 of the Revised Statutes—which is as follows: "846 (Sec. 198). An appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases,"—must be construed to give the right of appeal in cases within the jurisdiction of the supreme court, and not otherwise. *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649, is disapproved. The amount in controversy in this case being less than one hundred dollars, the motion to dismiss the appeal is sustained.

Baker, C. J., and Hawkins, J., concur.

[Civil No. 374. Filed January 16. 1894.]

[36 Pac. 34.]

THE SAN PEDRO CATTLE COMPANY, Plaintiff and Appellant, v. G. M. WILLIAMS, Defendant and Appellee.

- 1. JUDGMENT—DEFAULT—SUIT TO SET ASIDE—SERVICE ON AGENT—COLLUSION.**—In a suit in equity to have a former default judgment declared void, and for other equitable relief, it is error for the trial court to refuse to allow plaintiff to defend the original suit at law where it appears that appellant herein (defendant in the original suit) was a foreign corporation; that it had filed its appointment of its lawful agent of record in the county in which it did business; that such agent was its general manager when appointed, but was discharged six months prior to the filing of the first suit, though his appointment was not revoked of record until after that suit was filed; that he thereupon removed to another county and a new general manager was employed; that appellee was the son-in-law of the former manager, and, having full knowledge of the facts, commenced suit, served summons on his father-in-law, and took judgment by default the day after time to answer had expired, and before appellant had actual knowledge it was sued; that appellant filed its motion to set aside the default judgment as soon as it knew the same was entered, but the term of court adjourned before this motion was disposed of, and the appellant was deprived of the right to settle a bill of exceptions and appeal from the action of the court; that at another term it endeavored to get the judgment set aside, but failed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Frank H. Hereford, for Appellant.

Selim M. Franklin, for Appellee.

HAWKINS, J.—The appellant sued in the court below, asking that appellee be restrained from enforcing a certain judgment against it, rendered by default on October 24, 1890, (being cause No. 1866,) and that the same be declared void,

and for equitable relief. The transcript on appeal is voluminous, and numerous errors are assigned and attempted to be pointed out by appellant in his brief. He relies, first, on the seventh assignment, that the court erred in not finding from the evidence in the case that the plaintiff was entitled to have the judgment and default rendered in cause No. 1866 set aside and vacated. We will only consider this assignment.

It appears in the record that the appellant, a corporation organized under the laws of Missouri, with its principal office in that state, had for years been engaged in the cattle business in Pinal County, Arizona. In 1885 it filed, according to the statute, the lawful appointment of Justin C. Waterman as its agent of record, upon whom service of process could be made, with the county recorder of said Pinal County. This appointment remained on file, unrevoked of record, up to and including October 23, 1890. During these years, and up to March, 1890, Waterman lived in Pinal County, and was in the employ of the corporation appellant, as its general manager. In March, 1890, he was discharged as general manager, and moved to Pima County, Arizona. He remained in the employ of the company about three months longer. Some time in March, 1890, F. M. McKinney was employed as general manager of said corporation's cattle business, but he was not made agent of record, Waterman's appointment continuing to be the only one of record. In October, 1890, appellee filed an action (cause No. 1886) for damages against appellant in Pima County. On October 13, 1890, summons was served upon Waterman, as agent of appellant; and on the 24th of the same month judgment by default was taken against appellant. Waterman at these times was not in the employ of appellant. He was father-in-law of the appellee, and the fact of his having severed his connection with the company appears to have been known to appellee, as well as the fact that McKinney had succeeded Waterman as general manager of the affairs of the corporation. This judgment was rendered by default in eleven days after service of summons on Waterman, and before plaintiff actually knew it was sued. It filed a motion to set aside the default judgment as soon as it knew the same was entered. The term of court adjourned before this motion was disposed of, and the corporation was deprived of the right to settle a bill of

exceptions and appeal from the action of the court. At another term it endeavored to get the judgment set aside, but failed. Then this action was brought.

Courts of equity will not grant relief where a defendant has an adequate defense at law; but if he has had no opportunity to present his defense, or if prevented from making it by fraudulent acts of plaintiff, such relief will be granted in equity. *Whittlesey v. Delancy*, 73 N. Y. 575. We think the facts of plaintiff suing in Pima County, a county and district other than the one in which the corporation was doing business, and serving summons on Waterman, plaintiff's father-in-law, and entering the default judgment before the company knew it was sued, are facts sufficient for a court of equity to grant relief against the enforcement of the judgment, and allow a defense to be set up to the original action. As the law case will have to be tried, we do not see that it is necessary for us to pass upon the question of venue or the agency of Waterman. We think the court erred in not granting plaintiff permission to defend the suit at law. It is therefore ordered that the judgment be reversed, and the lower court ordered to set aside the judgment and default entered in cause No. 1886 therein, of *Williams v. San Pedro Cattle Co.*, and allow the defendant company in said action and appellant herein to plead and defend the same.

Baker, C. J., and Rouse, J., concur.

[Civil No. 416. Filed January 16, 1894.]

[35 Pac. 1058.]

THOMAS DAVIS, Defendant and Appellant, v. GEORGE T. DODSON, Plaintiff and Appellee.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—NECESSITY FOR—FUNDAMENTAL ERROR—*GILA R. I. CO. v. WOLFLEY*, 3 ARIZ. 176, 24 PAC. 257, CITED.—In the absence of any assignment of error, this court will not look further than to determine if there be any error apparent upon the face of the record, and which goes to the foundation of the action. *Gila R. I. Co. v. Wolfley*, *supra*, cited.

2. SAME—SAME—SAME—DENIAL OF MOTION FOR CHANGE OF VENUE—NOT FUNDAMENTAL ERROR.—Error in denying a motion for change of venue is not such fundamental error as requires a review in absence of an assignment of error.
3. SAME—SAME—SAME—MORTGAGES—FORECLOSURE—JUDGMENT—PRINCIPAL—DEFAULT IN INTEREST—WHEN REVIEWABLE.—In a suit to foreclose a mortgage for failure to pay interest, judgment and order for sale of the premises for the principal, if the principal be not due, is fundamental error, and will be reviewed in the absence of an assignment of error, if apparent on the record.
4. MORTGAGES — FORECLOSURE — DEFAULT IN PAYMENT OF INTEREST — PRINCIPAL NOT DUE—CONSTRUCTION—HOOPER v. STUMP, 2 ARIZ. 262, 14 PAC. 799, FOLLOWED.—On foreclosure for non-payment of interest of a mortgage providing "in case default be made in payment of the said principal or interest," then the mortgagee is empowered to sell the premises, "and out of the money arising from such sale to retain the said principal and interest," it is proper to enter judgment for the principal, and order a sale of the premises therefor. *Hooper v. Stump, supra*, followed.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Joseph H. Kibbey, Judge. Affirmed.

The facts are stated in the opinion.

Francis J. Heney, for Appellant.

G. C. Israel, and W. R. Stone, for Appellee.

BAKER, C. J.—There was a judgment below for the amount of a promissory note, and foreclosing a mortgage made to secure the payment of the same, and ordering a sale of the premises to pay both the principal and interest of the note. There being no assignment of errors, we will not look further than to determine if there be any error apparent upon the face of the record, and which goes to the foundation of the action. *Gila R. I. Co. v. Wolfley*, 3 Ariz. 176, 24 Pac. 257. This disposes of the alleged error in denying the motion for a change of venue. It has not been saved in the record.

It is claimed, however, that the principal of the note was not due, although the interest was, at the time of the judgment, and that the court erred in entering judgment for the principal, and in ordering a sale of the premises therefor. If such appears upon the face of the record,—that is, that the

principal was not due when suit was filed, and the judgment was rendered, and a sale of the premises ordered therefor,— we may consider it without any assignment of errors. The note is as follows: “\$7,500.00. Florence, Arizona, June 11th, 1891. On or before ten (10) years after date, I promise to pay to George T. Dodson or order seven thousand five hundred (\$7,500.00) dollars, value received, with interest thereon at seven (7) per cent per annum, payable annually at Bank of Montreal, Chicago, on June 11th of each year. [Signed] THOMAS DAVIS.” The mortgage to secure such note, and foreclosed in the suit, contained the following clause: “And these presents shall be void if such payment be made according to the tenor and effect thereof. But, in case default be made in the payment of the said principal or interest of said note as herein provided, then the said party of the second part, his heirs, executors, administrators, or assigns, are hereby empowered to sell said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest.” It is not denied but that the interest was due upon the note when suit was filed. The clause in the mortgage should be construed with the note, and in so doing we think it quite clear that the intention of the parties was, that upon a default in the payment of the interest a foreclosure might be had, and from the proceeds of the sale the plaintiff be allowed to retain both the principal and interest of the note. In *Hooper v. Stump*, 2 Ariz. 262, 14 Pac. 799, the court said, construing a like clause in a mortgage: “The language is plain, and can mean nothing else than, on failure to pay principal or interest, power is given to sell the premises, and retain such principal and interest. If it were only to cover interest, why say to ‘retain the principal’?” The clause of the mortgage passed upon in *Bank v. Johnson*, 53 Cal. 99, and relied upon by appellant, is entirely different from the mortgage in this case. It is not authority, as applied to the facts here. We are satisfied with the conclusion reached by the lower court, and the judgment is affirmed

Rouse, J., and Hawkins, J., concur.

Sloan, J., not sitting.

[Civil No. 387. Filed January 17, 1894.]

[36 Pac. 36.]

JOHN H. MARTIN, Plaintiff and Appellant, v. SANTA CRUZ WATER STORAGE COMPANY, Defendant and Appellee.

1. CORPORATIONS—OFFICERS—SALARIES—POWER OF DIRECTORS TO VOTE THEMSELVES SALARIES—RATIFICATION.—A resolution by a quorum of the board of directors of a corporation, voting one of their number, whose vote was necessary to its passage, a salary as secretary, is void, unless ratified by the shareholders in an unequivocal, clear, substantive act, done in full view of the material facts.
2. SAME—RESOLUTION OF DIRECTORS CONCERNING SALARIES TO MEMBERS OF BOARD — RATIFICATION — KNOWLEDGE BY STOCKHOLDERS INSUFFICIENT.—The subsequent ratification at a stockholders' meeting of another resolution, passed at the same meeting as the resolution fixing the salary of the secretary, does not constitute a ratification of the salary; nor does the fact that the minutes of the meeting containing the objectionable resolution were before the stockholders in itself convey any idea of the ratification.
3. SAME—SAME—SAME—RESOLUTION BY DIRECTORS INCREASING SALARY NOT A RATIFICATION.—A resolution to increase the salary of secretary passed by the board of directors composed in part of the directors who voted for the obnoxious resolution will not be treated as a ratification, even if they could ratify their own illegal act.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Charles W. Wright, and William H. Barnes, for Appellant.

“A majority of the whole board of directors constitute a quorum. When the meeting is properly called, and a majority attend, the majority may proceed to transact business. If a majority be present, a majority of that majority bind the board and the corporation, although they are a minority of the whole board.” *Wells v. Rahway etc. Co.*, 19 N. J. Eq. 402; *Cahill v. Bangor etc. Ins. Co.*, 12 Me. 354; *Cahill v. Kalamazoo etc. Ins. Co.*, 2 Doug. (Mich.) 124, 43 Am. Dec. 457;

Ex parte Willcocks, 7 Cow. 402, 17 Am. Dec. 525; *People v. Walker*, 2 Abb. Pr. 421; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743.

In *Buell v. Buckingham & Co.*, 16 Iowa, 284, 85 Am. Dec. 516, it was held that "A majority of a quorum of a board of directors of a corporation at a meeting at which a bare quorum is present, may bind the corporation."

The by-laws of a corporation provided that the president and two directors should constitute a quorum of the board. At a meeting at which the president and but two of the directors were present, a sale of the property of the corporation was made to the president. *Held*, that the sale was invalid for want of power. *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291. See, also, *Beach on Private Corporations*, sec. 276; *Bagaley v. Pittsburgh etc. Co.*, 146 Pa. St. 478, 23 Atl. 837.

The court below instructed the jury unqualifiedly that plaintiff could not recover for services rendered prior to June 20, 1891. This on the grounds that it was not within the province of the board of directors to vote remuneration for services already performed. As a general proposition this may be true, but in *Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646, the court said: "As this case goes back for a new trial, we desire to add, to guard against any misconception, that we do not agree with all the authorities heretofore cited as to the lack of power on the part of the directors to appropriate money in payment of the salary of the cashier or other officers, after the services have been rendered, and in cases where such cashier or other officer happens to be a director, we think the rule is, in the absence of positive restrictions, that an executive officer like that of cashier is entitled to a reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this though the appointee is also a director and continues to be such, while holding the independent office." See, also, *St. Louis etc. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544.

Selim M. Franklin, for Appellee.

Two propositions of law are well established:—

First—That where a director performs services as secretary or otherwise, without any agreement that he should be

paid therefor, a subsequent resolution that he shall receive back-pay is void;

Second—That as the plaintiff was interested in the proposition before the board he was not competent to form a quorum thereof, and the act of the board for that reason was void.

Cook on Stockholders says: "A salary or back-pay voted to a director after the services have been rendered cannot be enforced. It is invalid and void. It is the same as giving away the assets of the corporation." Sec. 657, p. 756.

Where a director of a railway company is appointed treasurer, and no provision at the time is made for his compensation, he will have no right to claim pay for the same, and the subsequent allowance of the claim in his favor will not entitle him to recover." *Holder v. Bloomington etc. R. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Gridley v. L. B. and M. R. Co.*, 71 Ill. 200.

It is held in Missouri that a director of a corporation, appointed secretary thereof, is not entitled to compensation for services as secretary in the absence of an express agreement therefor prior to the rendition of the services. *Pfeffer v. Lanberg Brick Co.*, 44 Mo. App. 59.

On the point that where the vote of the director himself is necessary to carry such a resolution such resolution is void, Cook says: "There is strong authority to the effect that the directors cannot vote a salary to themselves, even in advance of their services as directors. Certain it is that a resolution to pay a director for his services is not enforceable, even when made before his services are rendered if the vote of the director who is interested is necessary to carry the resolution." Cook on Stockholders, sec. 657, p. 755; *Butts v. Ward*, 37 N. Y. 317; *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Gardiner v. Butler*, 30 N. J. Eq. 702; *Jones v. Morrison*, 31 Minn. 140.

Appellant in his brief endeavors to show that the resolution of the board of directors was ratified because not disavowed or annulled at the subsequent meetings of the directors and stockholders.

The answer is this: If the resolution did not, as to services rendered prior to June, 1891, create any contract at all, then there was nothing to ratify.

BAKER, C. J.—The facts of this case are substantially as follows: The corporation was represented by a board of directors consisting of five members, named C. P. Sykes, C. H. R. Fitzgerald, F. W. Wright, F. C. Hollis, and the appellant, John H. Martin. Three of these—Martin, Fitzgerald, and Sykes—constituting a quorum, met upon February 3, 1891, and proceeded to elect appellant secretary of the corporation. At the same time they adopted a by-law which in effect authorized the board of directors to appoint a secretary and fix his salary. It is certain that the appellant voted for both of the propositions, his vote being necessary to any action at all. It is likewise certain that he assumed the duties of that office immediately upon his selection thereto. There was then no salary affixed to the office. Again, these three directors met, on June 20, 1891, no other director being present, and proceeded by a resolution to vote the secretary a salary of eighteen hundred dollars per annum, which was to commence as of February 2, 1891, five months prior thereto, and payable monthly. The appellant cast his vote for this resolution; otherwise, it was never passed at all, for his vote was essential to its adoption. All of this sufficiently appears from the record. This salary not being paid, the suit was commenced to enforce payment of eight hundred dollars, claimed as a balance for services as such secretary from February 2, 1891, to September 2, 1891. The appellant had judgment for two hundred dollars, and being dissatisfied, brings this appeal. It is conceded that he performed the duties of the office, whatever they were, from February 2, 1891, to September 2, 1891. Unless this transaction was ratified by the corporation or shareholders in an unequivocal, clear, substantive act done in full view of the material facts, it would be a reproach to the administration of justice to suffer a recovery. The appellant was a director of the corporation, and intrusted with its interest in a fiduciary capacity. He owed to his principal his fair, impartial, and distinterested judgment in fixing the salary of its secretary. The corporation had the right to demand of him his entire vigilance in its behalf. It is intolerable that an agent be suffered to act at the same time, in the same matter, for himself and principal too. The result of such a course, if allowed, would be manifest. The act of a fiduciary agent in dealing with the subject-matter of his trust or the

interest intrusted to his care and keeping to his own individual gain and profit is viewed by the courts with great jealousy, and will be set aside on slight grounds. The doctrine is founded on the soundest morality, and is frequently recognized. *Oil Co. v. Marbury*, 91 U. S. 587. All transactions so tainted are voidable without regard to the fairness or honesty of the act, *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665, and so a director of a corporation cannot vote himself a salary. *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Butts v. Wood*, 37 N. Y. 317. The rule is enforced with great rigor against officers voting themselves salaries. Thompson on Liability of Officers, 351. They cannot properly act on, nor form part of a quorum to act on, a proposition to increase their compensation. *Bank v. Collins*, 7 Ala. 95. Certainly they cannot vote themselves "back pay." It is like giving away the assets of a corporation. Cook on Stocks and Stockholders, sec. 657, p. 756; *Holder v. Railroad Co.*, 71 Ill. 106, 22 Am. Rep. 89. If they sue for the salary so created, they must recover upon an express contract to pay. They cannot recover *quantum meruit*. *Jones v. Morrison*, 31 Minn. 163, 16 N. W. 854. There are many authorities to the same import. *Gardner v. Butler*, 30 N. J. Eq. 702; *Goodin v. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; 1 Beach on Private Corporations, par. 201. But it is contended that the shareholders ratified the transaction. The directors, at the meeting, June 20, 1891, voted a salary to the secretary, and also authorized the issuance of certain bonds of the corporation. At a shareholders' meeting upon July 11, 1891, by resolution the act of the directors upon June 20, 1891, authorizing the issuance of such bonds, was ratified in express terms, but not a word was said about the salary of the secretary. The express ratification of one resolution passed at a given meeting and silence as to another passed at the same time is of more than slight significance. Just how it can be argued that such a state of matters supports a ratification of the resolution concerning which there was profound silence is difficult to understand. The fact that the minutes of the meeting containing the objectionable resolution were before the shareholders' meeting would not alone convey any idea of ratification. Nor is the contention that there was a ratification at a meeting of the directors held on September 6,

1891, tenable, for these reasons: That was a meeting of the board of directors, composed in part of the very directors who voted for the obnoxious resolution. It was not a meeting of the shareholders. The act claimed as a ratification is not a direct, substantive act with that object in view. In effect, it was an effort to increase this same salary; that is all. "That the secretary of the company, for his services as such, shall receive the sum of two thousand five hundred dollars per annum, instead of the sum of one thousand eight hundred dollars, as at a previous meeting ordered." We have as a result, should we treat this action as a ratification, some of the very same directors who voted for the vicious resolution indorsing their own wrongful act. But, in our opinion, that was not the intention of the directors, even if they could ratify their own illegal act; and we are not disposed to treat that as an indorsement which is so far removed, and can only be reached by a long line of inferences. In such a case as this, where a director votes himself into an office which at the time has no salary, and long afterwards votes himself a salary for his services in the office, making the salary to commence as of the day he obtained the office, we think the rule as to ratification should be such that for an act to be deemed a ratification, it must be done in full view of all the material facts and be an independent substantive act; in other words, it must amount to actual ratification, involving an express intention to adopt the act as the act of the corporation. Trifling laches, slight acquiescence, a brief season of silence, or remote inferences ought not to be suffered to give vitality to such shady transactions. 2 Morawetz on Corporations, par. 628; 17 Am. & Eng. Ency. of Law, p. 165. Our attention has not been directed to any other act or acts claimed as constituting a ratification. We are of the opinion that the instructions fairly presented the law governing the case. Had the appellee complained of the verdict and judgment against it for two hundred dollars, and brought its appeal here, doubtless it would have been sustained. The judgment must be affirmed.

Rouse, J., concurs.

Hawkins, J., concurs in the judgment.

[Criminal No. 86. Filed January 17, 1894.]

[36 Pac. 35, *sub nom.* *Ussery v. Territory of Arizona.*]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
KING USSERY, Defendant and Appellant.

1. CRIMINAL LAW—TRIAL—READING INDICTMENT AND PLEA TO JURY—NOT JURISDICTIONAL—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1643, CONSTRUED—FAILURE TO READ MAY BE WAIVED.—The reading of the indictment and the stating of the plea to the jury by the clerk, though directed by statute, *supra*, is not jurisdictional. Failure to comply with one or both of these requirements, if objected to by the defendant, would be error. The defendant may waive the right, and, failing to save any exception to such omission, will be presumed to have done so.
2. SAME—SAME—PLEA AND READING PLEA DISTINGUISHED—TERRITORY v. BRASH, 3 ARIZ. 141, 32 PAC. 260, CITED.—The failure to plead to the indictment is jurisdictional, *Territory v. Brash*, *supra*, cited; but the failure of the clerk to read the indictment and state the plea is not, and does not affect a substantial right of the defendant.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

E. J. Edwards, for Appellant.

Francis J. Heney, Attorney-General, and H. V. Jackson, District Attorney, for Respondent.

SLOAN, J.—The appellant was convicted at the October, 1892, term of the district court in and for the county of Pinal, of the crime of robbery. From the judgment of conviction and from the order overruling his motion for a new trial the appellant brings his appeal. The record fails to disclose that upon the trial the indictment was read to the jury by the clerk, or the plea of defendant stated, as required by section 1643 of the Penal Code. This omission constitutes the only ground upon which appellant relies for a reversal of the cause. The appellant took no exception to the omission, but went to trial without objection. In fact, the question is raised

for the first time in this court, as it was not made a ground for a new trial in the motion, and we might dispose of the question for that reason alone. We prefer, however, to consider the question as properly in the record, so far as any failure to incorporate the objection in the motion for a new trial is concerned. The record affirmatively shows that the defendant had, previously to the trial, been arraigned, and pleaded "Not guilty" to the indictment. The cause was therefore at issue. The reading of the indictment and the stating of the plea to the jury by the clerk, although directed by the statute, is in no wise jurisdictional. The failure to comply with one or both of these requirements, if objected to by the defendant, would unquestionably be an error. The purpose of the statute is to provide a method for informing the jury as to the nature of the charge against the defendant and the issue joined by him. This information the defendant has the right to have imparted to the jury in the formal mode pointed out by the statute. It is the usual and ordinary practice, however, upon the impaneling of the jury, for counsel to state to them the general nature of the accusation against the defendant, as well as his plea; and when this is done it is difficult to see how the defendant could be injured by the omission on the part of the clerk to again impart the same information by reading the indictment and stating the plea. At any rate, it seems quite clear to us that the defendant may waive, in such a case at least, his statutory right to have this done, and, having failed to save any exception to such omission, will be presumed to have done so. The failure to plead to the indictment, and the failure of the clerk to read the indictment and state the plea must be distinguished. The former is jurisdictional, as without a plea there can be no issue for the jury to try. *Territory v. Brash*, 3 Ariz. 141, 32 Pac. 260. The latter does not, as we have before stated, affect a substantial right of the defendant. *People v. Sprague*, 53 Cal. 491. The judgment is affirmed.

Baker, C. J., and Hawkins, J., concur.

Rouse, J., concurs in the result.

[Criminal No. 84. Filed January 17, 1894.]

[36 Pac. 35.]

**TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
ELIGIO MIRAMONTEZ, Defendant and Appellant.**

1. **CRIMINAL LAW—APPEAL AND ERROR—NEW TRIAL—CONFLICT IN EVIDENCE.**—Where the evidence is ample to sustain the verdict, though conflicting, a new trial will not be granted.
2. **SAME—SAME—RECORD—BILL OF EXCEPTIONS—ADMISSION AND REJECTION OF EVIDENCE.**—Errors in the admission or rejection of evidence should be embodied in a bill of exceptions.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Henry C. Gooding, Judge. Affirmed.

The facts are stated in the opinion.

H. N. Alexander, for Appellant.

Francis J. Heney, Attorney-General, and M. H. Williams, District Attorney, for Respondent.

HAWKINS, J.—This is a case wherein no briefs were filed by either party, and the cause is submitted to us on the record. We are, under paragraph 1904 of the Penal Code, called upon to review all decisions, opinions, orders, charges, rulings, actions, and proceedings made or had in the cause in the court below. It would be much more satisfactory if counsel had called our attention to the errors upon which he relies, and would materially aid us in arriving at a solution of the cause on appeal. The appellant was indicted and convicted of the crime of an assault with intent to commit murder. Appellant moved to set aside the verdict of the jury, and grant a new trial, on the ground that the verdict was not justified by the law or the evidence, and for errors of law committed at the trial. This motion seems to have been oral, and entered upon the minutes of the court. This is authorized under paragraph 1760 of the Penal Code.

It will be seen that the only errors complained of are:—

1. The verdict is contrary to law or evidence. We have

examined the instructions and charge of the court, and find that they fully cover the law in relation to the crime charged, and have read the evidence, which was ample to support the verdict. The evidence is conflicting, it is true, but the appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence, if the testimony is conflicting, and there is any evidence to support the verdict. *People v. Brown*, 27 Cal. 500. In *People v. Ah Loy*, 10 Cal. 301, the court said: "It requires a clear case—one in which there is an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor—to justify an interference with the verdict of the jury."

2. For errors of law committed at the trial. The record discloses the fact that no bill of exceptions was made; and if by this alleged error it is intended to save the point that the court has erred in the decision of any question of law arising during the course of the trial, such as on the admission of the evidence or rejecting proper testimony offered, it should be embodied in a bill of exceptions, or our attention directly called to the same. We have examined the statement of facts, and from the evidence therein find no such errors, and are of the opinion that justice has been done. Judgment affirmed.

Baker, C. J., Rouse, J., and Sloan, J., concur.

[Civil No. 399. Filed January 17, 1894.]

[37 Pac. 22.]

GILA COUNTY, Defendant and Appellant, v. JAMES H. THOMPSON, Sheriff, Plaintiff and Appellee.

1. OFFICE AND OFFICERS—SHERIFF—FEES—MILEAGE FOR PRISONER—REV. STATS. ARIZ. 1887, PAR. 1972, CONSTRUED—YAVAPAI CO. v. O'NEILL, 3 ARIZ. 363, 29 PAC. 430, CITED.—There is nothing in the Fee and Salary Act, *supra*, authorizing any charge to be made for mileage for a prisoner while in charge of an officer under a warrant of arrest. *Yavapai Co. v. O'Neill*, *supra*, cited.
2. SAME—SAME—SAME—MILEAGE FOR EXECUTING CRIMINAL PROCESS—REV. STATS. ARIZ. 1887, PAR. 1972, CONSTRUED—YAVAPAI CO. v. O'NEILL, 3 ARIZ. 363, 29 PAC. 430, FOLLOWED.—Under the Fee and

Salary Act, *supra*, an officer is allowed "for each mile he may be compelled to travel in executing criminal process, . . . to be charged one way only, thirty cents." To execute a warrant of arrest, an officer must not only arrest, but must remove the prisoner from the place of arrest to the court wherein the writ issued, and the officer is entitled to mileage not merely to the place of arrest but until he has brought his prisoner to the place named in the writ. *Yavapai Co. v. O'Neill, supra*, followed.

BAKER, J., dissenting.

3. SAME — SAME — SAME — DEMAND — ALLOWANCE — ACCEPTANCE PRECLUDES FURTHER CLAIM — REV. STATS. ARIZ. 1887, PAR. 414, CONSTRUED—YAVAPAI CO. v. O'NEILL, 3 ARIZ. 363, 29 PAC. 430, FOLLOWED.—Where the sheriff made out and presented his claim in the first instance for a less amount than he was entitled to receive, which was allowed by the board and accepted by him, he cannot, under the statute *supra*, make a subsequent demand for an additional allowance on the same demand. And if, in the first instance, he had made out a claim for the full amount of mileage which he was entitled to receive, but was allowed by the board only a part of his demand, his acceptance of such part precluded him, under said statute, *supra*, from bringing any action for the balance. *Yavapai Co. v. O'Neill, supra*, cited.

HAWKINS, J., dissenting.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

P. T. Robertson, District Attorney, and Cox & Street, for Appellant.

E. J. Edwards, for Appellee.

SLOAN, J.—This suit was brought in the district court of Gila County by J. H. Thompson, sheriff of said county, against said county, to recover upon an account for services as sheriff rendered in certain criminal cases, which account had been previously presented to the board of supervisors of said county, and by said board disallowed. Judgment was rendered in the court below for the plaintiff in the suit, from which judgment the county appeals.

The items of the account which were allowed by the court, and for which judgment was given are with one exception

similar in form and pertain to the same kind of service. Just what kind of service under the "Fee Act" these items were intended to include is somewhat difficult of ascertainment. The first item appearing in the account is as follows: "May 3. Territory vs. Zack Booth et als. To mileage, 150, for prisoner, from Phoenix, place of arrest, to Globe, @ 30 cts., \$45." This item of the account appears upon its face to be an attempt to charge mileage against the county for the prisoner, the distance the latter traveled, presumptively, while in charge of the plaintiff, under a warrant of arrest, in going from Phoenix, the place of arrest, to Globe, the latter place presumably the place from whence the warrant was issued. There is nothing in the Fee and Salary Act authorizing any charge to be made for mileage for a prisoner while in charge of an officer under a warrant of arrest. The officer is allowed mileage "for removing a prisoner"; but as was held by this court in *Yavapai County v. O'Neill*, 3 Ariz. 363, 29 Pac. 430, "removing a prisoner cannot be construed as meaning the taking of a prisoner after arrest to the place named in the warrant. It cannot therefore be, nor has it been contended, that the charge is made under the latter provision of the statute. It was evidently assumed in the court below that the charge was one for mileage for the sheriff in executing a warrant of arrest. It is impossible without doing violence to the language used to give such a construction to the account. We will assume, however, this to be the meaning and effect of the account, so far as it relates to the item above set forth. An officer is allowed "for each mile he may be compelled to travel in executing criminal process, . . . to be charged one way only, thirty cents." As was said by this court in the *O'Neill* case, "to execute criminal process . . . is to do what is in the writ commanded. A warrant of arrest in the form prescribed by our Penal Code not only commands the arrest, but also the bringing of the prisoner to the place of holding the court whence the warrant issued. To execute, therefore, a warrant, the officer must not only arrest, but remove the prisoner from the place of arrest to the court whence the writ issued." Logically, therefore, the officer is entitled to mileage not merely to the place of effecting the arrest, but, in addition, actual mileage, until he has completely executed the writ; that is, brought his prisoner to the court or place named in

the writ. The plaintiff, however, may not in this action recover under the latter provision of the statute. It was admitted upon the trial of the case that plaintiff had, before suit, been by the board of supervisors allowed and paid mileage in executing the warrant of arrest for the defendant Zack Booth for the distance of one hundred and fifty miles, counting from the county seat of Gila County to Phoenix, the place of arrest. It does not appear whether the plaintiff presented a claim to the board for more than the one hundred and fifty miles or not. It is immaterial so far as his right to recover in this action. A claim for mileage for executing any writ constitutes but a single demand against the county. The officer, in presenting it to the board for allowance, has no right to separate it into bits. If, therefore, the plaintiff made out his claim and presented it in the first instance for a less amount than he was entitled to receive, which was allowed him by the board and accepted by him, he ought not, nor can he, under the statute, make a subsequent demand for an additional allowance upon the same demand. Rev. Stats., par. 414. If, however, he had in the first instance made out a claim for the full amount of mileage which he was entitled to receive, but was allowed by the board only a part of his demand, his acceptance of such part precluded him, under said statute, from bringing any action for the balance. *Yavapai County v. O'Neill, supra.*

What we have said of the one item above set forth applies equally to the other items of the account allowed by the court below, with but one exception. There is a charge made in the account reading as follows: "Feb. 2d. To transportation for Benbrook, special guard, San Carlos to Globe, \$5." Inasmuch as this item is of the same date and appears in the account in connection with the charge made for mileage of a prisoner from San Carlos, place of arrest, to Globe, we infer that the expense of this special guard was incurred by the plaintiff in taking the prisoner from the place of his arrest to Globe. The facts, as admitted upon the trial, show that the sheriff was allowed by the board and paid for the expenses of transporting this prisoner, including a *per diem* and transportation of the guard. It is clear, therefore, that this is another attempt to sue for a part of a claim disallowed by the board after accepting payment for the amount of the claim

which was allowed. As we have before said, this cannot be permitted under the statute.

Upon no possible construction of plaintiff's account against the county, as the same is made out and sued upon, nor of the statute pertaining to fees to be paid the sheriff in executing criminal process, is the plaintiff entitled to recover, under the facts of this case, upon any of the items of the account allowed by the court below in the judgment. The judgment of the court below is therefore reversed, and judgment will be entered in this court for the appellant for costs.

BAKER, C. J.—I agree that the judgment of the lower court be reversed. I put it upon the ground that the sheriff ought not to recover upon any theory of the case. He cannot recover mileage for the prisoner, because no possible reading of the fee bill will authorize any allowance to the sheriff on account of that. This is conceded. If the item sued upon is to be understood as a charge for mileage for the sheriff, he should not recover, because the statute allows him mileage one way only in serving criminal process, and this, the record shows, has already been paid him. He has been paid for going to the place of arrest.

I dissent from so much of the opinion as approves of the case quoted,—*Yavapai County v. O'Neill*, 3 Ariz. 363, 29 Pac. 430. That case should be expressly overruled. It holds that a sheriff is entitled to mileage for going to the place of arrest as well as for mileage in returning with the prisoner to the court; and the reason given is, that to execute a warrant of arrest is to do what it commands,—return the prisoner to court. Thus the sheriff is paid mileage two ways,—going and coming. The fee bill for sheriffs is as follows: "For removing a prisoner, for each mile necessarily traveled, to be charged one way only, thirty cents, and for each guard the same. Insane persons are prisoners within the meaning of this act. For each mile he may be compelled to travel in executing criminal process, summoning or attaching witnesses, to be charged one way only, thirty cents." Rev. Stats., par. 1972, subd. 7. The legislature had in view but a single object in passing this law, and that was to fix a rate of compensation to the sheriff for executing criminal process, and not to define what should or should not constitute a complete execution

of that process. In its interpretation, the legislative purpose should be kept steadily in view. It is true that in one sense a warrant of arrest is not fully executed until the prisoner is arrested and brought into court, but it is not a necessary consequence that the measure for the sheriff's pay be fixed at both ways; that is, for going to the place of arrest and returning with the prisoner. For instance, suppose it be determined to allow him pay at the rate of fifteen cents per mile for the whole distance traveled; is not the same result accomplished when he is allowed thirty cents per mile for one way only? This is just what the lawmaker intended in this particular subdivision. There is indeed in this law an idea that the sheriff in executing the process will travel two ways,—that is, he will go to the place of arrest, and return with the prisoner,—but that idea is found in the very expression which limits the pay of the sheriff to one way only. In the sense of compensation, the warrant is fully executed when the prisoner is arrested. It seems to me as if this conclusion is firmly established when we come to look at the law as it stood prior to the passage of the subdivision. The law governing sheriffs' fees for executing criminal process then stood as follows: "For making an arrest, \$2.00. For each mile necessarily traveled, counted both ways from the court house of the county, for each mile, twenty cents." Laws 1883, p. 225. The legislature was in full view of this act when the present law was passed; and it is apparent that the intent was to reduce the price or charge per mile for the travel, and to change the method of counting the mileage; that is, instead of counting both ways traveled, and allowing twenty cents per mile therefor, as the old law plainly provided, the new law allows thirty cents per mile, counting one way traveled only. I think the above interpretation (it is a question of interpretation, and not of construction) is the true one. In *Yavapai County v. O'Neill*, *supra*, the court, in construing the subdivision, erroneously forced extraneous matter into the text; that is, what is required to constitute a complete execution of criminal process. This violates the well-known rule of construction that we are confined to the elements stated in the text. Lieber's *Hermeneutics* (Hammond's ed.), 44, 137. For these reasons I dissent in the particular above stated, and think *Yavapai County v. O'Neill*, *supra*, ought to be reversed.

HAWKINS, J., dissenting.—I dissent. I am of the opinion that the sheriff, if the bill had been properly made out, would be entitled to mileage for himself until the service of the writ was complete. The case seemed to me to have been tried on that theory, and that while the account read “for prisoner,” it really meant “for the sheriff for taking the prisoner” from the place arrested to the place of trial. And that appearing to me to do no violence to construction of the manner the account was worded, the judgment ought to stand against the appellant.

[Civil No. 353. Filed January 17, 1894.]

[37 Pac. 370.]

THE DELINQUENT TAX-LIST OF THE COUNTY OF
PIMA FOR THE YEAR 1891, Defendant and Appel-
lant, v. THE TERRITORY OF ARIZONA, Plaintiff
and Appellee. Appeal of MAISH and DRISCOLL, Ob-
jectors.

1. TAXES AND TAXATION — ASSESSMENT — DELINQUENT LIST — IRREGULARITIES—REV. STATS. ARIZ. 1887, PAR. 2688, CITED—ATLANTIC AND PACIFIC R. R. Co. v. YAVAPAI Co., 3 ARIZ. 117, 21 PAC. 768, FOLLOWED.—Objections to the manner of assessing taxes, preparing and returning the delinquent list, and similar questions are mere irregularities, and are covered by statute, *supra*. *Atlantic and Pacific R. R. Co. v. Yavapai Co.*, *supra*, followed.
2. SAME—LEVY — UNCONFIRMED MEXICAN LAND GRANTS — VALIDITY—WHO MAY QUESTION—TENDER OF TAXES DUE.—The objectors will not be heard to complain of the taxation of property consisting of “unconfirmed Mexican land grants,” having neither paid nor tendered the taxes admittedly due for the same year on other property owned by them.
3. SAME—UNCONFIRMED MEXICAN LAND GRANTS — LEVY — POSSESSORY RIGHT—REV. STATS. ARIZ. 1887, PAR. 2631, CITED.—The possessory right or claim of one in an unconfirmed Mexican land grant may be taxed, though the land belong to the public domain. Statute, *supra*, cited.
4. SAME—SAME—SAME—ASSESSMENT — INTERPRETATION — POSSESSORY CLAIM OR FEE.—If “grants” are a portion of the public domain until segregated and confirmed, an assessment of taxes to individ-

uals, as follows: "Land and improvements. San Ignacio La Canoa, private land claim," may be construed as an assessment upon the equitable claim or "possessory claim" thereto, and not as an assessment upon the fee or land itself.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, for Appellants.

Frank H. Hereford, and W. H. Lovell, for Appellee.

BAKER, C. J.—The appeal is taken from a judgment for delinquent taxes for the years 1889 and 1891. The objectors, Maish and Driscoll, urge a number of reasons why the taxes are invalid. They relate mostly to the manner of assessing the taxes, preparing and returning the delinquent list, and similar questions; all of which we deem mere irregularities, and covered by paragraph 2688 of the Revised Statutes, which was in force at the time of judgment. As to all of these objections we are content with the reasons given in the case of *Atlantic and Pacific R. R. Co. v. Yavapai County*, 3 Ariz. 117, 21 Pac. 768, and therefore overrule them. There is one objection, however, which goes to the validity of the tax levy, and this we will notice. Some of the property listed to the objectors consists of "unconfirmed Mexican land grants," and as to these it is contended that the tax levy is void, because such "grants" belong to the public domain until confirmed by proper authority, and are not subject to local taxation. If we concede this, we still ought to decide adversely to the appeal. There was other property, real and personal, listed to the appellants that year, the taxes upon which were certainly valid. The appellants neither paid such taxes nor offered to pay them. It is certainly not just and equitable that a taxpayer be suffered to retain taxes which he ought to pay, and at the same time be heard to complain of taxes which he claims he ought not to pay. He must first pay or offer to pay the taxes which are justly due the government. This the appellants did not do. *Railroad Co. v. Patterson*, 10 Mont. 90, 24 Pac. 704. Besides, we are inclined to view the levy in this

case as being upon the equitable claim or possessory right of the objectors in the "grants," and not upon the fee. If this is all that is taxed,—"the possessory right or claim,"—the tax is valid, though the land belong to the public domain. Rev. Stats., par. 2631; *Colorado County v. Commissioners*, 95 U. S. 265; *People v. Donnelly*, 58 Cal. 144. It is a part of appellants' argument that the "grants" are a portion of the public domain until segregated and confirmed by proper authority, which has not been done. If this be so, an assessment of taxes to individuals, as follows: "Land and improvements. San Ignacio La Canoa, private land claim,"—may be construed as an assessment upon the equitable claim or "possessory claim" thereto, and not as an assessment upon the fee or land itself. *Hale & Norcross M. Co. v. Storey County*, 1 Nev. 106. Judgment affirmed.

Hawkins, J., concurs.

ROUSE, J., dissenting.—I cannot concur in the opinion in this case. An "unconfirmed Mexican land grant" was listed as the property of Maish and Driscoll, and assessed. They failed to pay their taxes, and judgment therefor was rendered against them in the district court, and from that judgment they appealed. By the opinion it is declared that, inasmuch as Maish and Driscoll had not paid the taxes on the property which they owned, and which was properly assessed, even though the said unconfirmed Mexican land grant was not subject to taxes, the judgment should be affirmed. The case of *Railway Co. v. Patterson*, 10 Mont. 90, 24 Pac. 704, is cited as an authority in support thereof. The case cited was an application for an injunction. It was shown by the bill that the petitioner owed a part of the taxes; and further, that he had not applied to the proper tribunal to have the errors corrected; hence the bill was dismissed. The case at bar is quite different from that case. This judgment should be reduced by the amount of the taxes assessed on the said grant, provided said grant be not subject or liable for taxes. I cannot understand by reason or authority how a judgment for taxes for a certain amount must be upheld in the full amount because the party against whom the judgment was rendered has failed to pay the amount which he justly owes. I contend

that the said unconfirmed Mexican land grant is the property of the United States, and that the tax thereon is void. *Colorado County v. Commissioners*, 95 U. S. 265; *Railway Co. v. Prescott*, 16 Wall. 603; *Railway Co. v. McShane*, 22 Wall. 444. The right of Maish and Driscoll to the so-called "grant" or "claim" has not been recognized by the government in any way. It has not been surveyed. It has not been segregated from the other public lands. No possession or right of possession thereto is in Maish and Driscoll. They have no right or claim thereto that can be enforced in the courts. *Astiazaran v. Mining Co.*, 3 Ariz. 20, 20 Pac. 189. Certainly Maish and Driscoll have not a right in said land that can be taxed. Having no title and no possession, I do not understand what they have in connection with the so-called "grant," separate and distinct from the land, that can be taxed. The judgment should be reduced by the amount of the taxes levied on the said grant.

[Civil No. 381. Filed January 18, 1894.]

[36 Pac. 37.]

H. C. McDONALD et al., Appellants, v. HYMAN ELLIS,
Appellee.

1. APPEAL AND ERROR—BOND—JUSTIFICATION OF SURETIES—REV. STATS. ARIZ. 1887, PAR. 868, CONSTRUED, AND HELD MANDATORY.—The statute, *supra*, provides that a bond on appeal "shall be of no effect unless accompanied by the affidavit of each of the sureties that he is worth the amount for which he has signed, over and above his just debts and liabilities, exclusive of property exempt from execution." This statute is mandatory, and unless the statutes in relation to appeal-bonds and their justification are strictly complied with, this court can acquire no jurisdiction on appeal.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Dismissed.

The facts are stated in the opinion.

H. B. Lighthizer, for Appellants.

Kibbey & Israel, and M. H. Williams, for Appellee.

HAWKINS, J.—A motion to dismiss the appeal herein was filed by appellee for the reason that the instrument filed by appellants as a bond on appeal in said cause was not accompanied by the affidavit of each or either of the sureties thereon that he or they were worth the amount for which he or they signed the same, over and above his or their just debts and liabilities, exclusive of property exempt from execution, as is provided shall be done by paragraph 868 of the Revised Statutes of 1887. This paragraph provides that a bond on appeal “shall be of no effect unless accompanied by the affidavit of each of the sureties that he is worth the amount, for which he has signed, over and above his just debts and liabilities exclusive of property exempt from execution.” This statute is mandatory, and, unless the statutes in relation to appeal-bonds and their justification are strictly complied with, this court can acquire no jurisdiction on appeal. Rev. Stats. 1887, secs. 863, 868.

Dismissed.

Rouse, J., and Sloan, J., concur.

[Civil No. 367. Filed January 18, 1894.]

[35 Pac. 1059.]

JOHN BISHOP, Plaintiff and Appellant, v. E. B. PERRIN,
Defendant and Appellee.

1. ACTION TO QUIET TITLE—NATURE—POSSESSION IMMATERIAL—LAWS ARIZ. 1891, P. 66, CITED.—The action to quiet title is the ordinary means of trying a disputed title between two opposite claimants. In it the question of possession is immaterial, for it may be maintained by one either in or out of possession, and against one who claims an interest adverse, whether the adverse claimant be in or out of possession. Statute, *supra*, cited.
2. FORCIBLE ENTRY AND DETAINER—NATURE—ISSUE—POSSESSION—REV. STATS. ARIZ. 1887, PAR. 2016, CITED.—In forcible entry and detainer, the right to present and immediate actual possession is the only question for adjudication. Statute, *supra*, cited.

3. RES JUDICATA—LIMITED TO MATTERS PROPERLY LITIGATED IN SUIT.—
No judgment can be *res judicata* as to matters which the defendant had no legal right to have litigated or directly passed upon in that suit.
4. SAME—PLEA IN BAR—JUDGMENT IN FORCIBLE ENTRY AND DETAINER NOT GOOD IN BAR OF ACTION TO QUIET TITLE.—A judgment in an action of forcible entry and detainer is no bar to an action to quiet title to the same property.
5. SAME—SAME—JUDGMENT IN SUIT TO DECLARE SUCH JUDGMENT IN FORCIBLE ENTRY AND DETAINER VOID NO BAR TO ACTION TO QUIET TITLE.—A judgment in a suit to declare a judgment of forcible entry and detainer respecting certain property void, and to restrain the issuing of a writ of restitution thereunder is not a good plea in bar to an action to quiet title to the same property, as in the injunction proceedings the title was in no way involved, except incidentally.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Edmund W. Wells, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Hawkins, and Norris & Ellinwood, for Appellant.

Stewart & Doe, and Baldwin & Johnston, for Appellee.

BAKER, C. J.—The appellant filed his complaint in the lower court, being in form an action to quiet title to certain premises. The appellee answered, disclaiming all interest, title, or right in the premises described in the plaintiff's complaint, except as to a portion thereof, designated as "Bishop's Lake." This he claimed, and to plaintiff's cause of action respecting such portion of the premises he pleaded in bar two judgments—one being a judgment rendered against appellant and in favor of the appellee in an action of forcible entry and detainer for the same premises, obtained before a justice of the peace, and being affirmed upon appeal; the other being a judgment of the district court dismissing a bill and denying an injunction to declare the same judgment in forcible entry and detainer void and to restrain the issuing of a writ of restitution thereunder. These pleas in bar were sustained by the lower court, and whether or not this constitutes

error is the main contention here. The action to quiet title is an ordinary means of trying a disputed title between two opposite claimants. Pomeroy's Remedies and Remedial Rights, p. 423. The question of possession cuts no figure, for it may be maintained by one either in or out of possession, and against one who claims an interest adverse, whether the adverse claimant be in or out of possession. Sess. Laws Ariz. 1891, p. 66. In this action title is the main inquiry. But our statute expressly declares: "On the trial of any case of forcible entry or of forcible detainer, under the provisions of this act, the only issue shall be as to the right of actual possession; and the merits of the title shall not be inquired into." Rev. Stats., par. 2016. In forcible entry and detainer the right to present and immediate actual possession is the only question for adjudication. The statute is a conservator of the peace. It is too clear to require any citation of authorities that no judgment can be *res judicata* as to matters which the defendant had no legal right to have litigated or directly passed upon in that suit. The appellant, as we have just seen, by virtue of an express statute, could not, and as a matter of fact the title of "Bishop's Lake" was not, adjudicated in the forcible entry and detainer suit between the parties, and it was manifest error for the court to find in favor of the plea in bar. In the injunction proceedings the title was in no way involved, except it be incidentally. It was an effort to declare a judgment void, and restrain process thereunder. We do not think it concludes the appellant in this action, which is, as we have seen, an action to adjudicate title to the premises. The judgment might have been void independent of the title. The judgment is reversed, and a new trial ordered.

Sloan, J., and Rouse, J., concur.

Hawkins, J., not sitting.

[Criminal No. 83. Filed January 18, 1894.]

[35 Pac. 1059.]

UNITED STATES OF AMERICA, Plaintiff and Respondent, v. VICENTE ROMERO, Defendant and Appellant.

1. CRIMINAL LAW—MURDER—INSTRUCTION—DEFINITION—MALICE AFORETHOUGHT.—An instruction in a trial for murder under the United States laws, that if the deceased Indian was found dead in the judicial district on or about the twenty-eighth day of December, 1891, and the jury believe from the evidence beyond a reasonable doubt, that the defendant, after the death of the Indian, told witnesses that he had killed her, such statement would warrant them in finding the defendant guilty as charged in the indictment, is error, it omitting the principal ingredient of all murder,—malice aforethought.
2. SAME—SAME—SAME—READING STATUTORY DEFINITION.—Conceding that the territorial statute is substantially the same as the common-law definition of murder, the mere reading of the statute does not cure the defect in the above instruction.
3. SAME—SAME—SAME—REASONABLE DOUBT—MISLEADING.—An instruction that, "if you should find that you have not an abiding conviction, to a moral certainty, of the truth of the charge against the defendant, you have such a reasonable doubt that will warrant you in returning a verdict of not guilty; otherwise, you have not a reasonable doubt that will warrant an acquittal," is error, being confusing and misleading. Citing *Territory of Arizona v. Barth*, 2 Ariz. 319, 15 Pac. 673.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

H. B. Summers, and E. J. Edwards, for Appellant.

E. E. Ellinwood, U. S. District Attorney, for Respondent.

BAKER, C. J.—The appellant was indicted for murder alleged to have been committed in the killing of one Bill-ginpar, an Indian squaw, upon the White Mountain Indian Reservation, in Graham County; hence his prosecution under the United States statutes. The result of the trial was the

conviction of the appellant of murder, and therefore he was sentenced to death, that being the only penalty for that crime under the United States laws, in which there are no degrees of murder. It is sought to reverse the judgment of the lower court because of errors in the instructions of the court, one of which is as follows: "I charge you that if you believe, from the evidence in the case, that Bill-gin-par was found dead on the White Mountain Indian Reservation, in this judicial district, on or about the twenty-eighth day of December, 1891, and believe from the evidence, beyond a reasonable doubt, that the defendant, after the death of Bill-gin-par, told the witnesses Ortego and Bennett that he had killed her, such statement would warrant you in finding the defendant guilty as charged in the indictment." It is enough of this instruction to say that it signally omits the principal ingredient in all murder,—malice aforethought. Its harmfulness may be readily seen, in view of the evidence of the defendant at the trial, who testified in substance that he saw several Indians, among them the deceased, plundering his camp, and about to remove his provisions, and upon his attempting to retake his provisions, they drew their rifles and fired upon him, which fire he returned, no doubt killing the deceased. The instruction ignores all evidence about self-defense, and informs the jury that upon the bare statement of the defendant that he had killed the deceased he was guilty of murder. But it is contended that inasmuch as the court had, prior to giving this instruction, read the territorial statute to the jury defining murder, that the instructions, being taken as a whole, cured the faulty one. The United States statutes do not define the crime of murder, and it is far safer when proceeding under them to resort to the common law for a definition of the crime; but conceding that our territorial statute is substantially the same as the common-law definition of the offense, still we do not think that its mere reading to the jury cured the defect so apparent in the instruction. The jury would be more likely to give attention to and heed a charge couched in the language of the court than the dry and perfunctory reading of some statute. *People v. Valencia*, 43 Cal. 552. Again, the court instructed the jury: "If, after you have given to the evidence in the case earnest, patient, and conscientious consideration, with the determination to arrive

at the truth, you should find that you have not an abiding conviction, to a moral certainty, of the truth of the charge against the defendant, you have such a reasonable doubt that will warrant you in returning a verdict of not guilty; otherwise, you have not a reasonable doubt that will warrant an acquittal." This instruction is confusing and misleading. *Territory v. Barth*, 2 Ariz. 319, 15 Pac. 673. It is difficult to understand just what idea was intended to be conveyed, and for these reasons it ought not to have been given. The judgment must be reversed. It is so ordered and a new trial granted.

Sloan, J., and Hawkins, J., concur.

Rouse, J., not sitting.

[Civil No. 363. Filed January 22, 1894.]

[35 Pac. 1057.]

H. A. OWEN, Plaintiff and Appellant, v. JOHN HOWARD,
et al., Defendants and Appellees.

1. JUDGMENT LIEN—VOID JUDGMENT—POWER TO PERPETUATE LIEN.—A court has no power to perpetuate a judgment lien and at the same time declare the judgment upon which such lien depends for its validity null and void.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Mohave, Edmund W. Wells, Judge. Modified.

The facts are stated in the opinion.

James H. Wright, for Appellant.

Baldwin & Johnston, for Appellees.

SLOAN, J.—This action was instituted by appellant, H. A. Owen, in the district court of Mohave County, against the appellees, John Howard and G. Arthur Allen, to have a certain pretended judgment entered in the said district court on the

seventeenth day of February, 1879, in the suit of John Howard, plaintiff, against H. A. Owen, R. Eccleston, and M. Gueren, defendants, declared null and void, as well as certain proceedings had under and by virtue of said judgment, to wit, certain sales of mining claims owned by plaintiff, made under an execution issued out of said court under said judgment, and to have defendants restrained from further proceeding to collect said judgment. Upon the trial the court below found for the plaintiff, and entered its judgment as follows: "And the court, having fully considered said proofs and the law pertinent to the issues herein, does order, adjudge, and decree that the judgment rendered on the seventeenth day of February, 1879, and the execution issued thereon on the tenth day of February, 1884, and all subsequent proceedings thereon, be, and the same are hereby, declared null and void, except as to the hereinafter mentioned lien. It is further ordered, adjudged, and decreed that the lien of said judgment be, and the same is hereby, retained and continued upon any and all property affected by said judgment, and that said lien be so retained and continued until the further order of this court," etc. The appellant appeals from this judgment, and asks that so much thereof as attempted to create or perpetuate a lien upon his real estate be vacated and set aside.

The sole question therefore presented to us upon this appeal is the power of the court to perpetuate a judgment lien, and at the same time to declare the judgment upon which such lien depends for its validity null and void. It appears to us that the mere statement of the proposition sufficiently shows that no such power does or can exist in any court. That a judgment may be void, and yet constitute a lien, is a proposition utterly at variance with reason or common sense. If the judgment be void, then no valid lien can exist under it. If the lien be valid, then the judgment cannot be a nullity. A valid lien under and by virtue of a void judgment, in the nature of things, cannot exist. "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are void." Freeman on Executions, sec. 30. "In order that there should be a lien, it is necessary

that there be a valid and subsisting judgment. If the alleged judgment is absolutely void, and a mere nullity, it can, of course, create no lien." Black on Judgments, sec. 407. It is not the case of a judgment merely voidable. The latter has all the force and effect of a valid judgment until vacated or reversed in a direct proceeding to have its invalidity declared. It has accordingly been held that where the vacation of a judgment which is regular upon its face, though voidable, would otherwise operate to the injury of innocent third parties, by depriving them of any possible remedy, a judgment lien created by such judgment would be retained and perpetuated until a valid judgment could be entered. The case cited by appellees in their brief (*Bryant v. Williams*, 21 Iowa, 329) is such a case. An unauthorized appearance of an attorney was held good ground for setting aside the judgment, and, inasmuch as there had been delay in bringing the action to have such judgment set aside, the court, in that case, retained and continued the lien of the original judgment for the payment of such judgment as should ultimately be rendered in the case. But that is not this case, as appellees seem to think. The court in the case at bar found in its decree that the judgment was a nullity, and not merely voidable, and no right to any lien could be predicated thereon. So much, therefore, of the judgment of the court below as sought to continue or create any lien of the original judgment entered in the suit of *Howard v. Owen et al.* is vacated and set aside.

Baker, C. J., and Rouse, J., concur.

Hawkins, J., not sitting.

[Criminal No. 78. Filed January 23, 1894.]

[36 Pac. 175.]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
GEORGE W. HUNTER, Defendant and Appellant.

1. CRIMINAL LAW — APPEAL — NOTICE OF APPEAL — REV. STATS. 1887, PENAL CODE, PAR. 1866, CONSTRUED.—Under statute, *supra*, written notice of appeal in a criminal proceeding must be filed with the

clerk of the trial court to confer jurisdiction upon this court. A verbal notice of appeal given in open court and entered upon the minutes is insufficient.

2. SAME—SAME—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1866—
“STAYING” MISPRINT FOR “STATING.”—In the statute, *supra*, reading: “An appeal to the supreme court of the territory is taken by filing with the clerk of the court, in which the judgment or order appealed from is entered or filed, a notice *staying* the appeal from the same,” the word “staying” as printed is evidently a misprint of the word “stating.”

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Edmund W. Wells, Judge. Dismissed.

The facts are stated in the opinion.

Baldwin & Johnston, and James H. Wright, for Appellant.

Francis J. Heney, Attorney-General, for Respondent.

SLOAN, J.—A motion to dismiss the appeal herein was made by the attorney-general upon the ground that no notice of appeal as required by section 1866 of the Penal Code was filed in the court below. There is a minute entry in the record reciting that counsel for appellant, after the overruling of the motion for new trial, in open court gave notice of appeal to the supreme court of the territory. Said section 1866 reads as follows: “An appeal to the supreme court of the territory is taken by filing with the clerk of the court, in which the judgment or order appealed from is entered or filed, a notice *staying* the appeal from the same.” The word “*staying*,” as printed in the statute quoted, is evidently a misprint of the word “*stating*.” The section in the California Penal Code, from which ours was taken, confirms this reading. See Pen. Code Cal., sec. 1240. It is elementary law that where the statute points out a particular mode for taking an appeal that mode must be strictly adhered to in order to confer jurisdiction upon the appellate court. It is obvious that giving notice in open court that appellant intends taking an appeal is an essentially different proceeding from filing such notice with the clerk of the court. The word “*filing*,” as used in the section quoted, can be construed only as requiring a

placing or depositing with the clerk a written notice of intention of taking an appeal. See Black's Law Dictionary, p. 492. The appeal is therefore dismissed.

Baker, C. J., and Rouse, J., concur.

Hawkins, J., took no part in the above cause when the same was submitted to this court.

[Civil Nos. 401 and 402. Filed January 23, 1894.]

[37 Pac. 24.]

THOMAS T. EAMAN, Defendant and Appellant, v. BASHFORD & BURMISTER, Plaintiffs and Appellees.

ABRAM S. HEWITT, Defendant and Appellant, v. SAME.

1. MINES AND MINING—CONTRACT TO PURCHASE—MECHANICS' LIEN—PURCHASER AGENT FOR VENDOR—REV. STATS. ARIZ. 1887, PARS. 2278, 2280, CONSTRUED—FAILURE TO RECORD CONTRACT—FACTS CREATING EXCEPTION TO RULE THAT PURCHASER CANNOT CREATE LIEN.—Mott went into possession of mill and mining claims of appellant under a written contract, which, though in the form of a lease, was intended to enable the appellant to sell, and the said Mott to buy, the premises, by extracting and reducing the ore, and crediting the proceeds upon the purchase price. By its terms Mott was to mine and reduce the ore, and appellant was to receive the entire net proceeds, the cost of extracting and milling being deducted, for a period of six months; all payments to be forfeited and the property and improvements to revert to appellant if Mott failed to complete the purchase. Mott operated the mill for several months, and finally delivered back the mill with all improvements to appellant. Under paragraph 2278, *supra*, persons furnishing material for use upon mills, at the request of the owner or his agent, are given a lien thereon for the amount due. Paragraph 2280, *supra*, defines "agent" as including persons who have the charge or control of any mill, etc., upon which labor has been performed or material furnished. The improvements made upon the property were directly contemplated by the contract; the appellant was the beneficiary, whether Mott became the purchaser or not; Mott had "charge and control" of the mill and mines; the instrument never was recorded, and the appellees had no notice of its terms. Under such circumstances the principle that when one of two innocent parties must suffer a loss

by reason of the fault of a third, the loss should be borne by him who gave the third person power to commit the fault is applicable. The facts of the case take it out of the general rule that one having a mere contract to purchase, or a lessee, cannot encumber the property with liens, and Mott was properly held to be the agent of appellant in procuring the supplies, and the property was liable for the value thereof in the way of lien.

2. SAME—SAME—SAME—TERMS OF CONTRACT BINDING BETWEEN PARTIES CANNOT AFFECT LIEN.—A clause in such contract providing that the work should be done at the cost of Mott, while binding as between the parties, will not be suffered to defeat the lien.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Edmund W. Wells, Judge. Affirmed.

The facts are stated in the opinion.

J. F. Wilson, for Appellant.

Herndon & Norris, for Appellees.

BAKER, C. J.—These two cases were tried and decided below upon the same state of facts,—the facts being stipulated by the parties,—and they came here upon the same grounds. We therefore write the opinion in the first case only, viz., *Eaman v. Bashford & Burmister*.

This suit was brought to enforce a lien for supplies and material furnished and used in repairing and operating the Tuscumbia Quartz Mill. One S. C. Mott went into possession of the mill and the Black Warrior, Tuscumbia, and Tuscora mining claims under a written instrument from appellant, which, though in form a lease, was evidently intended to enable the appellant to sell, and the said Mott to buy, the premises, by extracting and reducing the ore, and crediting the proceeds upon the purchase price. By its terms, Mott was to mine and reduce the ore, and the appellant was to receive the entire net proceeds thereof for the first six months after June 1, 1890. The cost of extracting and milling was first to be deducted out of the ores. After December, 1890, the appellant was to take twenty-five per cent of the gross product of the claims. The purchase price of the property was to be six thousand dollars, and all money received by ap-

pellant for the sale of ore was to be credited upon the purchase price; and in the event of a failure to purchase the property by Mott, all payments should become forfeited, and become the money of the appellant. If Mott did not become the purchaser, the property, with all the improvements, was to revert to the appellant. The mines were to be securely timbered, and Mott was to do the assessment work for the year 1890 upon the Tuscumbia claim. The bullion was to be shipped in the name of appellant, and the returns received by him, and applied, in the first instance, to the payment of the expenses of extracting and reducing the same. The quartz upon the dump, and the tailings and concentrates left at the mill, were to revert to appellant, if Mott did not become the purchaser. The mill was apparently operated for several months, and finally delivered to appellant, with all the improvements. The court below held that Mott was the agent of appellant in procuring the supplies, and that the property was liable for the value thereof, in the way of a lien.

Rev. Stats., par. 2276: "All miners, laborers, and others who may labor, and all persons who may furnish material of any kind, designed or used, in or upon any mine or mining claim, and to whom more wages are due for such labor or material, shall have a lien upon the same for such sums as are unpaid." Paragraph 2278: "All foundrymen, boilermakers, and all persons who labor or furnish machinery, boilers, castings, or other materials for the construction, alteration, repairs, or carrying on of any mill, manufactory, or hoisting works at the request of the owner thereof or his agent, shall have a lien upon the same for the amount due him or them therefor." Paragraph 2280: "The word agent as used in this act shall be construed to include all contractors, subcontractors, architects, builders, and persons who have the charge or control of any mine, mining claim, canal, water-ditch, flume, aqueduct, reservoir, fence, bridge, mill, manufactory, hoisting-works, or other property or thing upon which labor has been performed or material furnished." This is a remedial statute, and ought to be construed so as to promote and advance natural justice. The giving of workmen and materialmen a lien upon property created, improved, or benefited by their labor or material is founded upon natural justice. The

statute is designed to accomplish that result. It is based upon the same principle recognized by the civil law, which gave to workmen and materialmen a similar right of compensation, called a "privilege," which took precedence over prior mortgages against property which they had improved. It is clear that the mining and reduction of the ore, the timbering of the mines, and repairing of the mill were directly contemplated by the parties at the time of the execution of the instrument. The appellant was to be benefited in either event, for if Mott became the purchaser the proceeds of the ore, less cost of extraction and reduction, were to be credited upon the purchase price; thus he would effect a sale of his property; and if Mott failed to become the purchaser all payments were to be forfeited and become the property of appellant, who was really more interested in the work than Mott. A large portion of the supplies were furnished to Mott during the period when appellant was to take all the net proceeds. It seems just that his property be held for the payment of these supplies, especially when it was stipulated that the ore should first pay the costs of its extraction and reduction. The bullion was to be shipped in the name of appellant, and returns made to him; and he was required to apply such proceeds to the payment of costs of the work in advance of all other claims. Thus was he fully protected against the encumbering of his property by the said Mott. It will be observed that the said Mott had the "charge and control" of the mill and mines, and that the instrument was never recorded. The appellees did not have notice of its terms, or, if they did, the record fails to disclose the fact. Under such circumstances, we may easily apply the familiar principle that, when one of two innocent parties must suffer a loss by reason of the fault of a third, the loss should be borne by him who gave the third person power to commit the fault. Mott did the assessment-work upon the Tuscumbia mine for 1890. There was sinking, stoping, drifting, and timbering done in the mines, and the mill was repaired. If any payments were made towards the purchase price, they were forfeited. The appellant received all such benefits. The facts of the case take it out of the general rule that one having a mere contract to purchase, or a lessee, cannot encumber the property with liens. There is a clause in the instrument which provides that

the work shall be done at the cost of the said Mott. This is binding as between the parties to the contract, but will not be suffered to defeat the lien. *Moore v. Jackson*, 49 Cal. 109. The judgment is affirmed.

Sloan, J., and Rouse, J., concur.

HAWKINS, J.—Having been of counsel in the court below, I did not sit in these cases, or take any part in the consideration of the foregoing opinion.

[Civil No. 406. Filed January 24, 1894.]

[35 Pac. 983.]

AGUA FRIA COPPER COMPANY, Defendant and Appellant, v. BASHFORD-BURMISTER COMPANY, Plaintiff and Appellee.

1. CLERK OF COURT—DEFAULT—POWER TO ENTER DURING SESSION OF COURT.—The fact that the court is in session does not deprive the clerk of the power to enter the default of a defendant.
2. DEFAULT—MOTION TO STRIKE AN ANSWER FILED AFTER ENTRY OF—EXCUSE FOR DELAY.—An answer filed after entry of default is properly stricken out on motion in the absence of any excuse for failure to file the answer within the time allowed by law.
3. SAME—MOTION TO OPEN AND FOR LEAVE TO FILE ANSWER—MUST SHOW EXCUSE FOR DELAY.—A motion to open a default and permit answer to be filed is properly denied where there is no excuse or reason offered why the defendant neglected to answer in the first instance.
4. CORPORATIONS—VALIDITY OF LAW INCORPORATING — WHO MAY QUESTION.—One will not be suffered to obtain goods of another, doing business as a corporation, and, retaining the goods, defeat a recovery by alleging the illegality of the act under which the corporation was formed.
5. SAME—MERCANTILE PURPOSES—REV. STATS. ARIZ. 1887, TIT. XII, CHAP. 2, NOT IN CONFLICT WITH REV. STATS. U. S., SEC. 1889—INDUSTRIAL PURSUITS.—The act of the territorial legislature, *supra*, authorizing the formation of corporations for mercantile purposes, is not in conflict with section 1889 of the Revised Statutes of the United States, *supra*, the term "mercantile business" being embraced in the words "industrial pursuits," as used in said statute.

6. ACCOUNT STATED—DEFENSES—NECESSITY FOR PRESENTING ACCOUNT FOR PAYMENT BEFORE SUIT FILED.—That an account was not presented to appellant for payment before suit was filed is no defense to an action upon an account stated.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge. Affirmed.

The facts are stated in the opinion.

J. F. Wilson, for Appellant.

Herndon & Norris, for Appellee.

An answer filed out of time, and without leave or consent, is no answer, and need not be noticed. The cause stands for hearing on default. *Luke v. Johnny*, 9 Kan. 511.

This action was for a balance due on account for goods, wares, and merchandise. The clerk was authorized to enter the default. Rev. Stats. Ariz., secs. 807, 808.

An affidavit of merits is indispensable in an application to set aside default. *Nevada Bank v. Dresbach*, 63 Cal. 324.

Filing an answer after a default has been entered does not affect the default. *Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506.

Defendant claims that plaintiff is a mercantile corporation, and that the law of this territory does not authorize a corporation for such purpose.

Chapter 2, title XII, authorizes such a corporation; and we do not deem it necessary to discuss this proposition. We do say, however, that if defendant bought goods from this corporation it does not lie in its mouth to now dispute the authority of the plaintiff to sell the goods.

The ruling of a trial court on a motion to set aside a default is largely a matter of discretion, and such ruling will not be disturbed unless the discretion has been abused. *Hoag v. Old People's Mut. Ben. Soc.*, 1 Ind. App. 28, 27 N. E. 438; *Carr v. School Dist. of Belton*, 42 Mo. App. 154; *Garner v. Erlanger*, (Cal.) 24 Pac. 805.

The affidavit fails to show that defendant suffered default by "Mistake, inadvertence, surprise, or excusable neglect," and without such showing defendant has no standing in this court. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 113.

BAKER, C. J.—Plaintiff below instituted suit upon a stated account, to recover a balance of \$421.10. The time for answering having expired, the clerk entered the default of the appellant, who, of course, was the defendant. Subsequently to such entry of default, the appellant filed its answer, consisting of an exception to the complaint, a motion to make more definite, and a general denial. Upon motion, this answer was stricken from the files, or, which is virtually the same thing, set aside, for the reason that it was filed after the time had expired for answering, and a default had been entered. This action of the court is assigned as error. The appellant did not offer any excuse whatever why it had not filed the answer within the time allowed by law. It assumed, as a matter of course, that the court would set aside the entry of default made by the clerk, and suffer it to answer without first showing any diligence upon its part. The fact that the court was in session did not deprive the clerk of the power to enter the defendant's default. It was not a judgment. The court afterwards entered that. To set aside or strike the answer from the files, under these circumstances, was not error. The appellant subsequently—to wit, July 11, 1893—moved the court to open the default and permit the answer to be filed. This motion was denied, and this action of the court is assigned as error. But, again, the appellant failed to offer any excuse or reason why it had neglected to answer in the first instance. Apparently, it did not propose to excuse its delay at all; as if this was an inquiry with which the court had nothing to do. But the court did offer to permit the appellant to appear and defend, if it would file an affidavit of merits. Treating this motion itself as an affidavit of merits (there being no other paper which it is possible to so designate), it claims that inasmuch as the suit is upon a mercantile account, and as the appellee is a mercantile corporation organized under the laws of this territory, it can have no valid existence, because the act of the territorial legislature (Rev. Stats. Ariz. 1887, title XII, chap. 2) authorizing the formation of corporations for mercantile purposes is in conflict with section 1889 of the Revised Statutes of the United States, which is as follows: "The legislative assemblies of the several territories shall not grant private charters or special privileges, but may, by general incorporation acts, permit

persons to associate themselves together as bodies corporate, for mining, manufacturing, and other industrial pursuits; and for conducting the business of insurance, banks of discount, and deposit, (but none of issue,) loan, trust, and guarantee associations, and for the construction and operation of railroads, wagon-roads, irrigating ditches, and the colonization of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association.”

It is hardly possible that one will be suffered to obtain the goods of another, doing business as a corporation, and, retaining the goods, defeat a recovery by alleging the illegality of the act under which the corporation was formed. We do not care to countenance such a result. But it is evident that the territorial act is not in conflict with said section 1889 of the Revised Statutes of the United States. The term “industrial pursuit,” for which the legislature may authorize corporations to be formed, is a very broad expression. For instance, it was decided by Judge Deady in *Wells, Fargo & Co. v. Northern Pacific R. R. Co.*, 23 Fed. 469, that the express business was an “industrial pursuit” within the meaning of that term. Just why the sale of goods, mining supplies, etc., should be less “industrial” than the express business would, in our opinion, be difficult to maintain. Besides, Congress, in enacting section 1889, was endeavoring to prevent the granting of monopolies and special privileges, rather than specifying all the purposes for which corporations might be formed. And then, too, the mercantile business is certainly industrial; it is embraced in the words “industrial pursuits,” according to their popular or ordinary usage. These views will be found in *Carver Mercantile Co. v. Hulme*, 7 Mont. 566, 19 Pac. 213; *Wells, Fargo & Co. v. Northern Pacific R. R. Co.*, 23 Fed. 469. The objection that the account was not presented to appellant for payment before suit is without merit. If, then, we consider this motion as an affidavit of merits, the matter therein set up constitutes no defense. We see no error in the record; and as the court properly denied this motion, and proceeded to judgment upon proofs, the judgment is affirmed.

Sloan, J., and Rouse, J., concur.

[Civil No. 403. Filed January 25, 1894.]

[36 Pac. 214.]

In re Application of EMIL SYDOW for a Writ of Habeas Corpus.

1. **LICENSE—MERCHANTS—REV. STATS. ARIZ. 1887, PAR. 2239, SEC. 9, AS AMENDED BY ACT NO. 83, LAWS OF 1893, VOID IN PART, AS IN CONFLICT WITH THE CONSTITUTION OF THE UNITED STATES.**—Act No. 83 of the laws of 1893, amending paragraph 2239, section 9, of the Revised Statutes of 1887, *supra*, providing for the collection of a license tax from "every person, firm, or corporation, who may deal in goods, wares, and merchandise, except in agricultural or horticultural products of this territory, when vended by the producer thereof, and except when sold by auctioneers or commission merchants, under the license or permission, according to law," is not in conflict with clause 1 of section 2 of article IV of the constitution of the United States, providing: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," nor with clause 3 of section 8 of article I of the constitution, providing: "The congress shall have power . . . (3) To regulate commerce with the foreign nations, and among the several states, and with the Indian tribes," except that portion which permits agricultural and horticultural products of this territory to be vended by the producer without a license, and an auctioneer or commission merchant to vend such products without being required to obtain a license in addition to his license as an auctioneer or commission merchant.
2. **SAME—ACT VOID IN PART.**—A license act may be void in part without rendering the whole act invalid.
3. **SAME—RIGHT TO COMPLAIN OF TAX—RECORD MUST SHOW EXEMPTION.**—Where the record fails to show that the applicant was dealing exclusively in the product of the privileged class, he cannot complain of imprisonment for failure to obey the License Act.

ORIGINAL APPLICATION for a Writ of Habeas Corpus.

The facts are stated in the opinion.

W. H. Barnes, and Allen R. English, for Petitioner.

Francis J. Heney, Attorney-General, for Territory.

ROUSE, J.—The petitioner was arrested on a warrant issued by James F. Duncan, a justice of the peace of Cochise

County, Arizona, on a complaint as follows: "That on or about the 1st day of December, A. D. 1893, in the county of Cochise, territory of Arizona, one Emil Sydow did then and there commit the crime of misdemeanor in this, to wit: The said Emil Sydow, being then and there a merchant dealing in goods, wares, and merchandise, which were not then and there the agricultural or horticultural products of this territory, and he not being then and there the producer of said goods, wares, and merchandise so dealt in, and sold by him as such merchant, and he not being an auctioneer or [commission] merchant, did conduct, transact, and carry on such business without first paying for or obtaining the lawful license therefor, as provided by law, and in violation of paragraph 2236 (sec. 6) title XLII of the Civil Code of the Revised Statutes of Arizona, and also act No. 83 of the Laws of 1893, of said territory, being an act to amend paragraph 2239 (sec. 9), title XLII of the Revised Statutes of said territory, and the said amendment thereof, and also in violation of paragraph 684 of the Penal Code of Arizona." To said complaint he pleaded not guilty, was tried thereon before said justice of the peace December 28, 1893, found guilty, and fined \$20.60, and in default of payment of said fine was committed to the jail of Cochise County, in the custody of the sheriff of said county, by whom he is now detained in custody and restrained of his liberty. He now presents his petition for a writ of *habeas corpus*. He contends that his imprisonment is illegal, in this: That the said act No. 83 of the Laws of 1893 of the territory of Arizona is void, for the reason that it is in conflict with the provisions of article 4 (sec. 2, cl. 1) and of article 1 (sec. 8, cl. 3) of the constitution of the United States.

Title 42 of the Revised Statutes of Arizona imposes a license tax on certain occupations therein enumerated, and is general in that respect. Paragraph 2235 (sec. 5) thereof is as follows: "A license must be procured immediately before the commencement of any business or occupation liable to a license, from the sheriff of the county, where the applicant desires to transact the same, which license authorizes the party obtaining the same in his town, city, or particular locality in the county, to transact the business described in such license. . . ." Paragraph 2236 (sec. 6) thereof, which is referred to in the complaint, is as follows: "Whenever any person shall

violate the provisions of this act, by transacting any business whatever for which a license is required by the provisions of this act, he shall be deemed guilty of a misdemeanor, and on conviction, shall be fined in any sum not more than three hundred dollars. . . . That in default of the payment of the fine . . . the defendant shall be imprisoned in the county jail. . . .” Paragraph 2239 (sec. 9) thereof, also referred to in said complaint, is as follows: “All persons, liquor dealers and others, who shall sell or dispose of any wines or distilled or malt liquors, in quantities of two gallons and upwards, shall pay license taxes, as follows: First Class. Those whose quarterly sales amount to twenty-five thousand dollars and upwards, shall pay a tax of one hundred and twenty-five dollars per quarter. . . .” Paragraph 684 of the Penal Code, referred to in said complaint, is as follows: “Every person who commences or carries on any business, trade or profession, or calling for the transaction or carrying on of which a license is required by any law of this territory without taking out or procuring the license prescribed by such law . . . is guilty of a misdemeanor.” Act No. 83 of the Laws of 1893 of the territory of Arizona, referred to in the complaint, is a substitute for paragraph 2239, and enacts, before that part of said paragraph above quoted, the following: “There shall be collected a quarter-yearly license tax from all persons and corporations engaged in the business, trade, or occupation in this act named, as follows: Merchants. Every person, firm, or corporation, who may deal in goods, wares, and merchandise, except in agricultural or horticultural products of this territory, when vended by the producer thereof, and except when sold by auctioneers or commission merchants, under the license or permission according to law, . . . shall pay, . . . license tax. . . .”

We repeat that paragraph 2239 (sec. 9) of the Revised Statutes was amended by act No. 83 of the Laws of 1893, by inserting that part last quoted before the words “liquor dealers and others,” and it is that part of said act that petitioner contends is in conflict with the articles of the constitution of the United States referred to. Clause 1 of section 2 of article 4 of the constitution is as follows: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” And clause 3 of section 8 of article 1 of

the constitution is as follows: "The Congress shall have power: . . . (3) To regulate commerce with the foreign nations, and among the several states, and with the Indian tribes." The power to regulate commerce between the states, by the constitution of the United States, is vested in Congress. A state has not the right to pass a law imposing a tax directly upon the products of other states brought within its limits, nor can it impose a license upon dealers in such products which is not required of dealers in the same kind of products of domestic production or manufacture. *Welton v. State*, 91 U. S. 275; *Brown v. Maryland*, 12 Wheat. 425; *Woodruff v. Parkham*, 8 Wall. 123; *Hinson v. Lott*, Id. 148; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213; *Webber v. Virginia*, 103 U. S. 344; *Guy v. Baltimore*, 100 U. S. 434; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091. Such a law would discriminate injuriously against the products of other states and the rights of their citizens, and would therefore fetter commerce among the states, and deprive the citizens of other states of privileges and immunities to which they are entitled, and would be unconstitutional and void. But a state has the power to require licenses for the various pursuits and occupations carried on and conducted within her limits, and to fix the amount thereof, as she may choose, provided the rights above mentioned are not infringed. *Webber v. Virginia*, 103 U. S. 344; *Welton v. State*, 91 U. S. 275; Cooley on Taxation, p. 570. And it may license some occupations, and exempt others. Id. It will not be contended that any of the sections of the laws of Arizona referred to are in violation of the provisions of the constitution mentioned, or to any other provisions thereof, excepting the said act No. 83 of the Laws of 1893, *supra*.

Again we copy the part thereof containing that portion which the petitioner complains of: "Paragraph 2239 (sec. 9): There shall be collected a quarter-yearly license tax from all persons and corporations engaged in the business, trade or occupation in this act, named as follows: Merchants. Every person, firm or corporation, who may deal in goods, wares and merchandise, *except in agricultural or horticultural products of this territory, when vended by the producer thereof, and except when sold by auctioneers or commission merchants, under license or permission according to law, . . .* he or they

shall pay a . . . license tax.” “Liquor dealers and others.” Only to that portion of said act which we have placed in italics can an objection be urged. By it agricultural and horticultural products of this territory may be vended by the producer thereof without a license; also, an auctioneer or commission merchant may vend such products without being required to obtain a license in addition to his license as an auctioneer or commission merchant. If a citizen of another state should bring to this territory the agricultural or horticultural products of his own production, produced beyond the limits of this territory, and be required to pay a license for the privilege of vending them, said act would be a tax on such productions, and be unconstitutional. But suppose, in addition to such productions, he should desire to vend any other goods, wares, and merchandise. Could he do so without paying a license for the privilege of vending such other goods, for the reason that the same law required a license on goods which were exempt? If so, then the whole act would be void, and the merchants of the territory would have the right to do business without any license. But said act is not void or defective in any other respect than that mentioned. It required a license from parties, as merchants, dealing in other goods, wares, and merchandise, and as to that part the law is certainly valid. As we stated above, a state has the power to require licenses for the various pursuits carried on and conducted within her limits, and to fix the amount thereof as she may choose. *Webber v. Virginia*, 103 U. S. 344; *Welton v. State*, 91 U. S. 275; *Cooley on Taxation*, p. 570. And that it may license some occupations and exempt others, and may license dealers in one class of goods, wares, and merchandise and not require a license from dealers in other classes. *Id.* p. 570 et seq. It does not appear from the record in this case that petitioner was engaged exclusively in vending agricultural or horticultural products which were not the production of this territory. In fact, it does not appear from the record what he was engaged in selling as a dealer. Before he could be released, it would have to appear that he was not engaged in vending anything as a merchant, excepting the products of the privileged class. So far as we know from the record before us, he may have been engaged in selling the commodities usually vended by a saloon-keeper; or he may have been en-

gaged as a dry-goods or clothing merchant, or in hardware or agricultural implements, or in millinery goods or sewing-machines. Indeed, he may have been engaged in vending any of the wares enumerated, or in vending all of them, and they may all have been of the production of other states, or even of foreign countries. If so, he cannot complain, unless the whole of his goods were of the class exempted by the act in question. The record failing to show that petitioner was injuriously affected by the act referred to, the writ of *habeas corpus* is denied.

Sloan, J., and Hawkins, J., concur.

BAKER, C. J.—I concur in the result. The opinion would be precise if limited to a single point—namely, the petitioner does not show that he is a dealer in either agricultural or horticultural goods not the products of this territory. He fails, therefore, to show that he is injuriously affected. A law may be valid as to some classes of cases, and void as to others. It will not be held invalid upon the objection of one whose interests are not affected in the manner which the constitution forbids. Cooley on Constitutional Limitations, p. 218.

[Criminal No. 80. Filed January 26, 1894.]

[36 Pac. 207.]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
DANIEL WEST, Defendant and Appellant.

1. CRIMINAL LAW—INDICTMENT—ASSAULT WITH INTENT TO COMMIT MURDER—ASSAULT WITH A DEADLY WEAPON—SUFFICIENCY OF INDICTMENT FOR FORMER CRIME TO CONSTITUTE GOOD INDICTMENT FOR LATTER.—Where appellant was tried under an indictment for assault with intent to commit murder, and the crime of assault with a deadly weapon was charged therein under the general designation of a "felony," and the kind of instrument or weapon with which the assault was made was therein fully described, and the mode in which it was used, so that, as a matter of law, said weapon, as described and used, was a deadly weapon, such indictment charges the appellant with the crime of assault with a deadly weapon as

fully as if the pleader has added thereto the particular name of the offense, by setting it out in the indictment in the exact language of the statute.

2. **SAME—SAME—ASSAULT WITH INTENT TO COMMIT MURDER—ASSAULT WITH DEADLY WEAPON—LATTER NOT PART OF FORMER OFFENSE—WHEN LATTER OFFENSE FULLY CHARGED IN INDICTMENT FOR FORMER CONVICTION FOR LATTER WILL BE SUSTAINED.**—Though the crime of assault with a deadly weapon is not a part of the crime of assault to commit murder, if in the indictment charging the last-mentioned offense the former is fully charged, a conviction for the former offense thereunder would be valid.
3. **JURY — INSTRUCTION — AMBIGUITY — IN SPECIAL INSTRUCTION—CORRECTNESS TESTED BY ALL INSTRUCTIONS.**—The instructions in a case must all be considered together; and if, when considered together, they present the law of the case, the verdict will not be disturbed, even though the phraseology of an individual instruction may be confusing.
4. **SAME—SAME—NECESSITY FOR REQUEST.**—In the absence of a request for an instruction defining a deadly weapon, the court is not compelled to give such instruction.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

The facts are stated in the opinion.

J. F. Wilson, for Appellant.

Francis J. Heney, Attorney-General, and J. C. Herndon, District Attorney, for Respondent.

ROUSE, J.—Appellant was indicted and tried for the crime of “an assault to commit murder,” and a verdict was returned finding him guilty of “an assault with a deadly weapon.” Judgment was pronounced against appellant, on said verdict, that he be imprisoned in the territorial prison; and he appealed, and urges as ground of error that the crime of which he was found guilty is not charged in the indictment against him, and for errors of the trial court in giving a certain instruction, and also in failing to give an instruction defining a “deadly weapon.”

The indictment on which he was tried is as follows: “. . . The said Dan West is accused by the grand jury of said

county of Yavapai, by this indictment, of the crime of a felony, committed as follows, to wit: The said Dan West . . . did unlawfully, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, upon the body of one R. B. May, then and there being, commit an assault with a certain deadly weapon, to wit, with a pistol, generally called and known as a 'six-shooter'; said pistol then and there being loaded with leaden bullets and gunpowder, and then and there being held in the hands of the said Dan West, and said pistol then and there by said Dan West, being pointed towards, at, and near the body of said R. B. May, and said pistol then and there being cocked, and ready to be discharged, by unlawfully, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, pulling the trigger of said pistol, and attempting to discharge the bullets from said pistol at, towards, near, and into the body of said R. B. May, the said Dan West then and there having the ability to discharge and fire the leaden bullets from the said pistol at, towards, near, and into the body of said R. B. May, with the . . . intent him, the said R. B. May, then and there to kill and murder. . . ."

The court gave a number of instructions requested by parties, among which was one for the territory, numbered 7. Appellant complains of said instruction. It is as follows: "The court instructs the jury that, under the indictment in this case, they may find the defendant guilty of assault with intent to commit murder, or guilty of assault with a deadly weapon, when no considerable provocation appears, or when the circumstances of the assault show an abandoned and malignant heart; and if, after a full and careful consideration of all the evidence, the jury have a reasonable doubt that the defendant was guilty of an assault with intent to commit murder, but do believe from the evidence, beyond a reasonable doubt, that defendant is guilty of an assault with a deadly weapon upon the person of said R. B. May, where no considerable provocation appears, or under circumstances which show an abandoned and malignant heart, then the jury should so find by their verdict." By said instruction the jury were advised that if they had a reasonable doubt of defendant's guilt of the crime of an assault to commit murder, they might find

defendant guilty of the crime of an assault with a deadly weapon. The indictment is good as a charge for an assault to commit murder, and it also contains allegations which make it a good charge for an assault with a deadly weapon. An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense. Pen. Code., par. 1409. The term "public offense" in this territory has the same meaning as the word "crime," and they may be used interchangeably. They are defined to mean an act committed or omitted in violation of a law forbidding or commanding it. Pen. Code, par. 15. Crimes are divided into felonies and misdemeanors. Pen. Code, par. 16. A felony is a crime which is punished with death, or by imprisonment in the territorial prison. Pen. Code, par. 17. An indictment must contain the title of the action, the names of the parties, a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. It is sufficient if, in the indictment, the name of the crime is given in its legal appellation, such as murder, arson, manslaughter, burglary, or the like, or to designate it as a felony, with a statement thereafter of the acts or omissions constituting the offense. The indictment must be certain as to (1) the party charged; (2) the offense charged; (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. In this territory, a crime which may be punished by imprisonment in the territorial prison, or by a fine or imprisonment in the county jail, is a felony, if imprisonment in the territorial prison be imposed. Pen. Code, par. 17. "An assault with a deadly weapon" is defined as follows: "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the territorial prison not less than one, nor more than five years, or by fine not exceeding five thousand dollars, or by both." Pen. Code, par. 394. Applying the foregoing tests to the indictment, we find appellant was accused of a felony; that the crime of an assault with a deadly weapon, of which he was convicted, was charged in said indictment, under the general designation of a "felony"; that the kind of

instrument or weapon with which the assault was made was therein fully described, and the mode in which it was used, so that, as a matter of law, said weapon or instrument, as described and used, was a deadly weapon. The indictment therefore charged the appellant with the crime of an assault with a deadly weapon as fully and as completely as if the pleader had added thereto the particular name of the offense by setting it out in the indictment in the exact language of the statute. We agree with the views of the learned counsel for appellant that the crime of an assault with a deadly weapon is not a part of the crime of an assault to commit murder. But if in the indictment charging the last-mentioned offense the former is fully charged, we cannot discover by reason or authority why a conviction therefor would not be valid.

The giving of the instruction complained of, in so far as it advised the jury that they could return a verdict of guilty of an assault with a deadly weapon, was not error. The instructions in a case must all be considered together; and if, when considered together, they present the law of the case, the verdict will not be disturbed, even though the phraseology of an individual instruction may be confusing. Tested by this rule, we find no reversible error in the giving of said instruction.

Counsel for appellant contends that the court should have defined a "deadly weapon," and in failing to do so the case should be reversed. In support of his position, he cites the case of *People v. Fuqua*, 58 Cal. 245. In that case, after the jury retired to consider their verdict, they returned into court, and asked for an instruction defining a "deadly weapon." In a debate between the court and jury, the jury were informed that they must assume that responsibility. The supreme court held that it was the duty of the court to define what was a deadly weapon; that it was a question of law, for the court to settle. We accept that as a correct proposition, as a rule. Bishop on Criminal Law, sec. 335; Bishop on Statutory Crimes, sec. 320. Under the facts of that case, the failure to define a "deadly weapon" was error. But we cannot construe that case to be a decision requiring a court to define "deadly weapon" in every prosecution for an assault with a deadly weapon. We decided at this term that if the parties ask special instructions, the court must pass upon

them, and give or refuse them; further, that the court was not compelled to give instructions unless instructions were requested. *United States v. Chung Sing, post*, p. 217, 36 Pac. 205. In the case before us the indictment described the weapon and the manner in which it was used. As described, and the manner in which it was used, the weapon was a deadly weapon. If, from the description of the weapon and the manner of its use, as set forth in the indictment, or from the evidence on the trial of the case, the deadly character of the weapon had been in doubt, and if the court had been requested to instruct thereon, and had failed to do so, then it would have been error, and the case would have had to be reversed. Finding no error in the record, the judgment of the district court is affirmed.

BAKER, C. J.—I concur in the judgment, but do not agree with some of the reasons given, and think that others are not necessary to the result. The indictment charges an assault with intent to murder, and avers that the assault was made with a deadly weapon. This being so, the last-named offense is necessarily included in the former; and for that reason the jury was very properly told that it could find defendant guilty of the lesser offense. Pen. Code, par. 1715; *People v. Pape*, 66 Cal. 366, 5 Pac. 621. The defendant, having failed to request the court to define what constitutes a deadly weapon, cannot be heard to complain of his own neglect. Pen. Code, pars. 1677, 1678; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102.

SLOAN, J., concurs in the judgment.

[Criminal No. 92. Filed January 26, 1894.]

[36 Pac. 205.]

UNITED STATES OF AMERICA, Plaintiff and Respondent, v. CHUNG SING, Defendant and Appellant.

1. CRIMINAL LAW—GENERAL REPUTATION—EVIDENCE—LIMITED TO TRAIT INVOLVED IN THE CHARGE.—In a trial for disposing of ardent spirits to an Indian, objections to questions as to the reputation of de-

fendant being a law-abiding citizen are properly sustained, the questions propounded not having been put in form to secure answers to defendant's general reputation in the trait involved in the charge against him.

HAWKINS, J., dissenting.

2. APPEAL AND ERROR—CONFLICT IN EVIDENCE.—Where there is sufficient evidence to sustain a verdict, this court will not grant a new trial, though the evidence be conflicting.
3. CRIMINAL LAW—CHARGE TO JURY—APPEAL AND ERROR—RECORD—NO DUTY TO CHARGE UNLESS REQUESTED—REV. STATS. ARIZ. 1887, PENAL CODE, PARS. 1677, 1679, CITED.—Where the record is silent on the subject of charge to the jury, except that it contains a paper entitled in the cause, being in the form of a charge, but which was not placed in the record in any way, it cannot be considered. As the law does not make it the duty of the court to charge the jury unless requested as provided in paragraphs 1677 and 1679, *supra*, the court did not err in refusing to grant a new trial for errors in charging the jury.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

Bethune & McCabe, H. N. Alexander, and J. B. Woodward, for Appellant.

E. E. Ellinwood, United States District Attorney, for Respondent.

ROUSE, J.—Appellant was indicted, tried, and convicted of the crime of disposing of ardent spirits to an Indian under the charge of an Indian agent, in violation of section 2139 of the Revised Statutes of the United States. Appellant made a motion for a new trial on the following grounds, viz.: “1. Because the court erred in admitting and rejecting evidence; 2. Because the court erred in charging the jury; 3. Because the evidence does not sustain the verdict of the jury.” The motion for a new trial was overruled, and appellant was sentenced to imprisonment. On the trial, after the testimony for the prosecution was closed, defendant offered himself as a witness, and at the close of his testimony one J. B. McNeil was called as a witness on his behalf, and the following ques-

tions were asked him, viz.: "Question. Do you know the reputation of Chung Sing in the community in which he lives?—Answer. I do.—Q. What is that reputation, as to his being a law-abiding citizen? Is it good or bad?" The questions were objected to by the counsel for the government, and the court sustained the objections, and of that ruling the appellant complains. Counsel for appellant contends that the court erred in refusing to allow the witness to answer the questions. The United States attorney, to the contrary, insists that the ruling was correct, for the reasons: 1. That evidence of the character of the accused can only be offered by him in cases where a guilty knowledge or criminal intention is of the essence of the offense,—that is, in cases which are *mala in se*, and not in those which are *mala prohibita*; 2. That the questions called for defendant's character in general, and not for the trait involved in the case; and 3. That the questions did not call for the general reputation of the accused. In a criminal prosecution the law at the outset clothes the defendant with the presumption of innocence. We cannot attach too much importance to this principle. It is a cardinal point, to be ever kept in view, and, if followed, it is hardly possible for the stings of passion, prejudice, and suspicion to furnish a victim for judicial condemnation. When the proof adduced by the prosecution tends to overthrow the presumption of innocence of the accused, and to fix upon him the perpetration of the crime, he is permitted to support the original presumption of innocence by proof of the fact that his personal character in the trait involved in the charge has previously been good. The proof of good character is in aid of the general presumption of innocence, and is a fact to be considered by the triers in their deliberations, along with the original presumption itself, and with all the other facts and circumstances in evidence. *People v. Ashe*, 44 Cal. 288; 1 Bishop on Criminal Procedure, sec. 488; 2 Russell on Crimes, 704. Good character is a fact that the accused may offer in his defense, but, in order that it may be admissible, it must be character in the trait involved in the charge. That is, if the charge be adultery, a character for chastity may be proven; if for larceny, character for honesty may be offered as a defense, etc. *Commonwealth v. Nagle*, 157 Mass. 554, 32 N. E. 861; *People v. Ashe*, 44 Cal. 288. The character that may be introduced

in evidence is the general reputation of the accused, and the questions must be framed so as to secure answers as to the general reputation of the accused in the trait involved in the charge. The questions propounded to the witness not having been put in form to secure answers as to defendant's general reputation in the trait involved in the charge against him, the court properly sustained the objections thereto.

As to the error complained of, "that the evidence does not sustain the verdict of the jury," we have to state that the evidence on the trial was conflicting. The jury could have found a verdict either way on the evidence. The court that tries a case has the right to set aside a verdict of guilty, and to grant a new trial, when, in its judgment, the verdict is against the evidence. That power is not limited to cases where the weight of the testimony is to be considered, but is an inherent power, which may be exercised by the trial court; and that right cannot be questioned by an appellate tribunal. If, therefore, a trial court refuses to set aside a verdict and grant a new trial on the grounds that the verdict is not sustained by the evidence, its ruling will not be disturbed by an appellate tribunal if the record shows there was evidence to support a verdict. The trial court, on a trial, can observe the manner of the witnesses, and can judge of the weight of their testimony, which cannot be done by an appellate tribunal, which has not the witnesses before it. We cannot disturb the judgment for that ground.

The last point urged for a reversal of the case is for errors of the court in charging the jury. Either party in a criminal action may ask that special instructions be given. The court must indorse upon each instruction the word "Given" or "Refused," and under said word the judge must sign his name, etc. Pen. Code 1887, par. 1677. The court, in addition to the special instruction above mentioned, may charge the jury, stating to them all such matters of law as it may think necessary for their information in giving their verdict. The charges of the court to the jury shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally, or unless a phonographic reporter be in attendance upon the trial, and shall take down in shorthand the charges. Pen. Code 1887, par. 1679. An examination of the record in this

case discloses the fact that no written charges were given or asked by either party; further, that the defendant did not consent in open court for the charges to be given verbally. In other words, the record is silent on the subject of charges, and from it we do not know that any charges were given in any manner. We find among the papers on appeal, but not referred to in the record, and not indorsed by the trial judge or the clerk of the district court, a paper which was sent up to this court by the clerk of the district court in obedience to an order of this court on suggestion of a diminution of the record, being in the form of a charge of the court to the jury in a case entitled as the case before us is entitled, and which, no doubt, contained the charges of the court on the trial of this case, taken down by a stenographic reporter, and written out by him, as required by paragraph 1679, *supra*. Said paper was not placed in the record of this case in any way, and cannot be considered in the case. As we cannot consider said paper, and as the law of this territory does not make it the duty of the court to charge the jury unless requested to do so in the manner heretofore mentioned, the court did not err in refusing to grant a new trial on the ground last mentioned and urged by appellant. We are of opinion that the judgment should be affirmed, and it is so ordered.

Sloan, J., concurs.

HAWKINS, J.—I concur in the judgment. The court properly sustained the objection to the question asked as to the reputation of the defendant, for the reason that such evidence is only admissible as to the general reputation. I, however, do not agree with the expression in the opinion that, “in order that it [evidence of good character] may be admissible, it must be character in the trait involved in the charge.” It should not be limited to such trait. It is a character of evidence of which any man charged with crime has a right to avail himself. A party charged with selling liquor to Indians would have the undoubted right to prove his general reputation as a good and law-abiding citizen, and let that fact go to the jury together with all the other evidence in the case. Evidence of a previous good character is relevant in all criminal cases to the question of guilty or not guilty, and

is to be considered by the jury with the other facts in the case. 1 Bishop on Criminal Procedure, 3d ed., par. 1114; *People v. Shepardson*, 49 Cal. 629. Such evidence as to character is permitted a wider range than being confined to the particular trait of character which the indictment impugns. 1 Bishop on Criminal Procedure, par. 1113.

[Civil No. 383. Filed January 26, 1894.]

[36 Pac. 212, *sub nom.* Glencross v. Evans.]

JOHN M. EVANS, Defendant and Appellant, v. FRANK GLENCROSS et al., Plaintiffs and Appellees.

1. **CONTRACT—PLEADING—FAILURE TO PERFORM CONDITIONS—MUST BE RAISED BY ANSWER—ADMISSION BY FAILURE TO PLEAD.**—In an action upon a contract, the complaint alleging performance of all its conditions, and the answer being a special denial, to avail himself of a breach of a certain condition, the defendant should have denied in his answer that the same had been fulfilled, or specially pleaded the same as matter of defense; otherwise, the allegation of the complaint, not being controverted, will be taken as admitted.
2. **SAME — CONDITIONS — PERFORMANCE — WAIVER — FACT FOR JURY.** — Whether a contract has been performed or its performance waived, is usually a question of fact for the jury.
3. **APPEAL AND ERROR—RECORD—BILL OF EXCEPTIONS—MUST CONTAIN ALL EVIDENCE OR PROOF PRESUMED.**—Where the bill of exceptions does not purport to give all the evidence, proof sufficient to support the judgment will be presumed to have been supplied.
4. **SAME—QUESTION FIRST RAISED ON APPEAL.**—A question not specially pleaded in the court below, nor raised in either the motion for a new trial or in arrest of judgment, cannot now be raised for the first time in this court.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

Alexander & Stilwell, and Kibbey & Israel, for Appellant.

The contract in this case provided that final payment was not to be made until all bills for labor and material were

paid and furnished receipted to the owner, and the house delivered free and clear from all claims, liens, etc., of every description, immediately after the completion of the work. This condition has never been complied with.

The plaintiffs had no cause of action against the defendant until they had complied with this condition. *People v. Glenn*, 70 Ill. 232; 1 Chitty on Pleading, pp. 321-323; *Moore v. Campbell*, 111 Ind. 343, 12 N. E. 495; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137; *Sargent v. Adams*, 3 Gray, 72, 63 Am. Dec. 718; *Richardson v. Maine Ins. Co.*, 46 Me. 394, 74 Am. Dec. 459; *Cunningham v. Morrell*, 10 Johns. 202; *Butler v. Tucker*, 24 Wend. 447.

“Where the time for the payment of money is to happen after the performance of that which is the consideration, no action accrues for the money until the consideration is performed.” *Crane v. Knubell*, 43 How. Pr. 389; *Barton v. Herman*, 11 Abb. Pr. N. S. 378; *Grant v. Johnson*, 5 N. Y. 274; *Smith v. Brady*, 17 N. Y. 175; *Erickson v. Brandt*, 53 Minn. 10, 55 N. W. 62.

C. F. Ainsworth, for Appellees.

It will be seen from the motion for a new trial and the causes there set out that the appellant did not rely in the court below upon the necessity of proving this particular allegation as a ground for setting aside the verdict. It is not mentioned in their motion for arrest of judgment, nor claimed that it was necessary under the pleadings for the plaintiffs to prove this particular allegation, nor that there was not sufficient evidence to sustain it, if it had been denied by the answer, and it is too late now to raise a question in this court for the first time, it being admitted by the answer of the appellant in the court below. *Tiernan v. His Creditors*, 62 Cal. 286; *Estate of McCarty*, 58 Cal. 335; *Wardle v. Cummings*, 86 Mich. 395, 49 N. W. 538; *Watkin v. Clifton H. L. and Co.*, 91 Tenn. 683, 20 S. W. 246; *Stepp v. National Life etc. Assn.*, 37 S. C. 417, 16 S. E. 134; *Waterhouse v. Black*, 87 Iowa, 317, 54 N. W. 342.

The bill of exceptions does not contain all of the evidence given on the trial of this cause. It merely purports to take out of the testimony offered on the trial certain disconnected statements of three witnesses for the purpose of attempting

to show that no receipted bill was furnished by plaintiffs to defendant Evans, and that therefore, as claimed by appellant, this action could not be maintained.

There was no issue for the court to try on this particular question, for the reason that the performance of this condition was admitted by appellant's answer, whatever this evidence, disconnected as it is from the other testimony in the case, may tend to show. The testimony upon which this judgment was rendered is not all before the court, and this court is bound to presume that the testimony as offered in the court below, if all presented in the bill of exceptions, would clearly establish the plaintiffs' right to recover, and this the court will presume, although the testimony set out by the appellant in the bill of exceptions tends to disprove the plaintiffs' right to recover. The presumption of law is, that other testimony was given on the trial which destroyed the force and effect of that preserved. *Edwards v. Smith*, 48 Wis. 254, 3 N. W. 758; *McCormick v. Ketchum*, 48 Wis. 643, 4 N. W. 798; *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697; *Ford v. Holton*, 5 Cal. 320; *Todd v. Winants*, 36 Cal. 130; *Paine v. Smith*, 32 Wis. 339; *Woodlock v. Combs*, 49 Wis. 659, 6 N. W. 362; *McNelly v. Holliday*, 105 Ind. 324, 4 N. E. 894; *Crystal v. City of Des Moines*, 65 Iowa, 502, 22 N. W. 646; *Collins v. Collins*, 100 Ind. 266; *Evansville etc. Co. v. Kendall*, 4 Ind. App. 460, 30 N. E. 1110; *City v. Babcock*, 3 Wall. 240; *Hoagland v. Cole*, 18 Colo. 426, 33 Pac. 151.

HAWKINS, J.—This was an action commenced in the lower court to recover of the appellant the sum of \$837. The complaint set out two causes of action: First, for \$444, balance alleged to be due on a building contract set out in the complaint; second, for \$393, for extra materials and labor alleged to have been furnished by appellees to appellant, and for which it is alleged appellant agreed to pay appellees reasonable prices, and that a reasonable price for the same was \$393. An itemized account for such materials is set out in detail in the complaint. The appellees, in their cause of action on the building contract, allege a compliance with all the conditions and terms of said contract, so far as the same was not afterwards modified. A copy of the contract is attached to the complaint, and one of the specifications therein is: "And

it is further agreed by said Frank Glencross, William Brotherton, and H. W. Ryder, the parties of the second part, that they will pay all bills for labor and materials, and deliver the building clear and free from all claims, liens, etc., of every description, immediately after the completion of the work, and furnish all bills receipted before the last payment will be made; and the parties of the second part further agree to guaranty the full payment of claims that may be presented and approved within six months after the building may be completed." Appellant seems to rely upon the following of said conditions: "And furnish all bills receipted before the last payment may be made." The answer is a special denial, admitting and denying certain allegations of the complaint, and there is no special denial as to the performance of this particular condition. The jury rendered a verdict for \$685 for appellees, and judgment was rendered thereon against appellant. Appellant moved for a new trial, and set out the following grounds: First, the verdict is contrary to, and not sustained by, the evidence; second, that the verdict is contrary to, and not supported by, the law; third, that the verdict is contrary to the law and evidence; fourth, for errors of law committed by the court on the trial of said cause, in admitting and rejecting evidence offered, and errors in giving and refusing instructions offered and requested to be given to the jury.

A motion in arrest was made: "That the pleadings and proof in the case, as now appears of record, show that the plaintiffs had no cause of action against defendant at the time of bringing suit, at the trial, or rendition of verdict, or at the date of filing his motion." This motion was overruled.

The allegation of the complaint, not being controverted by appellant, was taken as admitted; and the testimony of Glencross on cross-examination was irrelevant and immaterial and improper cross-examination, and no doubt would have been stricken out if objection had been made thereto. If appellant had intended to rely upon this condition of the contract, he should have denied in his answer that the same had been fulfilled, or specially pleaded the same as a matter of defense. The action appears to have been tried in line of the theory set up in the complaint and answer. Appellant pleaded that the work in the building was not done in a workmanlike man-

ner and within the time specified in the contract, and set up various claims for damages, for overtime, the unskillful manner of work done on roof, also overcharge for extra work; and the verdict of the jury shows he was allowed \$150 therefor. Whether the contract has been performed, or its performance waived, is usually a question of fact, for the jury. Thompson on Trials, par. 1141. Under the instructions given, it seems to have been fairly submitted to the jury, and was settled by the jury.

The question upon which appellant relies now does not seem to have been raised in the motion for a new trial, or the motion in arrest of judgment; and if it were material under the pleadings, the bill of exceptions does not purport to give all the evidence, and we cannot say that Brotherton or Ryder did not furnish the bills receipted, notwithstanding the statement of Glencross,—that is to say, the proof will be presumed to have been supplied, unless the error is affirmatively shown *Ford v. Holton*, 5 Cal. 320; *Todd v. Winants*, 36 Cal. 129. The question upon which appellant now relies not having been specially pleaded in the court below, nor raised in either of his motions, he cannot now raise the same for the first time in this court. *Estate of McCarty*, 58 Cal. 335.

The record further shows that appellant was notified of the completion of the house, and that it would be delivered to him upon his paying for same; that he took possession by means of pass-keys, without taking the trouble to get the keys from the contractors, or paying for it; and he submitted his controversy fairly to a jury. So we are unable to see wherein he has any just cause of complaint at the verdict. Judgment affirmed.

Sloan, J., and Rouse, J., concur.

[Civil No. 382. Filed January 26, 1894.]

[36 Pac. 209.]

DAVID BALSZ et al., Defendants and Appellants, v.
ADOLPH LIEBENOW, Plaintiff and Appellee.

1. PUBLIC LANDS—EJECTMENT—RIGHT TO MAINTAIN—RECEIVER'S DUPLICATE RECEIPT OF ENTRY—REV. STATS. ARIZ. 1887, PAR. 3138, CONSTRUED.—A receiver's duplicate receipt of a homestead filing upon land, made after contest and cancellation of the entry of a prior occupant, is not sufficient evidence of title and right to possession in the holder thereof to maintain an action of ejectment against such prior occupant. Statute, *supra*, construed.

ROUSE, J., dissents.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. H. C. Gooding, Judge. Reversed.

The facts are stated in the opinion.

H. N. Alexander, for Appellants.

The court erred in admitting in evidence plaintiff's exhibit number one. This is a receipt of the register of the land office at Tucson, Arizona, which defendants claim was inadmissible to prove title or right of possession in plaintiff. In some states, by statute, such papers are sufficient to maintain ejectment, notably Arkansas and Nebraska, and in some others, but in Arizona we have no such statute. *Langdon v. Sherwood*, 124 U. S. 74, 82, 83, 84, 85, 8 Sup. Ct. Rep. 429.

The court should have instructed the jury to render a verdict for defendants at the close of plaintiff's evidence, as the proof showed at the time, by plaintiff's own evidence, that he had never been ousted from the possession by defendants or any one else, and that at that time he was in possession of the premises.

C. F. Ainsworth, for Appellee.

This action being one to try the right of possession to the property in question, the title is not involved, it being conceded by the appellants that the title to the land in question is

in the United States government; the only question is the right of possession.

Under our statute (sec. 3135) this action is maintainable wherever the plaintiff is legally entitled to the possession of the premises sought to be recovered. No allegation of ownership is required to be set out in the complaint; the plaintiff is only required to set out in his complaint that he was entitled to the possession of the premises, describing them, and that the defendant on a day named in the complaint afterwards, and before the commencement of the action, entered into and dispossessed him of the premises and unlawfully withheld from the plaintiff the possession thereof, etc. Rev. Stats. 1887, sec. 3137.

The defendant, under a general denial, may introduce testimony to show that the plaintiff is not entitled to the possession, or that the title is in some other person other than the government (Rev. Stats. 1887, sec. 3138); thus clearly implying that when the title is in the United States government that that is no defense to the action.

It is further provided by section 3139 that it shall be sufficient to entitle the plaintiff to recover to show, at the time the action was commenced, that the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof.

Section 3152 also provides in all actions involving the title or right of possession to real estate the court shall frame the judgment so as to grant the relief demanded by the proof and the law applicable to the case, and all writs necessary to enforce the judgment may be issued thereon.

These statutes clearly show that there are two classes of cases in which the action for the recovery of the possession of real estate may be maintained:—

First—Where the title is involved, and the question of right of possession is based upon the title to the land;

Second—In cases where the title is not involved, but where the right to possession is based upon other facts and circumstances which entitle a party to possession of such real estate.

The latter is the case at bar. The government of the United States is presumably in possession of all its lands. By acts of Congress the United States is authorized to dispose of its lands through a tribunal created by Congress known

as the general land office of the United States. It is also provided by acts of Congress that lands may be conveyed to citizens of the United States under what are known as the Timber Culture Act, the Homestead Act, the Pre-emption Act, and the Desert Act, upon the terms and conditions specified by the general land office, to whom this power is delegated to supervise the sale and disposition thereof under the different provisions so provided by the acts of Congress.

The appellee in this action, as the record shows, was the favorable contestant,—that is to say, his contest was finally allowed by the general land office and the secretary of the interior. Under this contest he was, by section 2 of the act of Congress passed March 14, 1880, (Stats. 21, p. 140,) expressly allowed the right to enter the land to which such contest referred at any time within thirty days after he should be notified that such contest had been decided in his favor. He accordingly took advantage of his right, made his filing as provided by the rules and regulations of the general land office, and to him was issued a receiver's certificate. Now, what is the object of this receiver's receipt? It is for the purpose of authorizing the party to whom it is issued to enter into possession of the lands therein described for the purpose of completing and perfecting a title to said lands under the requirements of law. If it is not for the purpose of authorizing the party to whom it is issued to enter into possession, then it amounts to nothing. For if some other person is in possession of the premises described in the receiver's certificate, and who has no title whatever, he may defeat the government of the United States from disposing of its lands to persons seeking to obtain the title in the manner provided for obtaining title by the Homestead Act. The government itself would in that case first have to institute suit to dispossess parties before they could execute said certificates to entrymen, and we submit that in this case both parties claim their right to possession to these lands in question, not by any title that either of them have, but by the right of entry.

The appellants claim through and under C. H. Vail, who made the entry under the Timber Culture Act. His entry was contested by the appellee and such contest sustained, and his entry ordered by the secretary of the interior canceled; therefore, the right to enter upon the land which he obtained in the

first instance has been by this act of the government set aside. These appellants, taking under and through Vail, are bound by that judgment and decree, and that question cannot be litigated in this court in this collateral proceeding. Courts cannot exercise any appellate jurisdiction over the rulings of the officers of the land department, nor can they reverse or correct their decisions in collateral proceedings between private parties. *Shepley v. Cowan*, 91 U. S. 330; *Quinby v. Conlan*, 104 U. S. 420.

The land department is a tribunal appointed by Congress to decide certain questions relating to the disposition of public land, and its decisions upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else. *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. Rep. 249; *Baldwin v. Starks*, 107 U. S. 463, 2 Sup. Ct. Rep. 473; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Vance v. Burbank*, 101 U. S. 514.

The land department having decided in favor of Liebenow's entry, it is conclusive as between the parties to this action, and the receiver's certificate is also sufficient evidence to the right of possession to maintain this action as against the appellants herein, who show no title to the land; and especially is this so where the appellee is a successful contestant authorized to make the entry. *McDonald v. Edmonds*, 44 Cal. 328.

SLOAN, J.—Appellee brought suit in the district court, Maricopa County, against appellants, to recover the possession of the northeast quarter of section 12, in township 1 north, range 3 east, Gila and Salt River base and meridian. There was a jury trial, and verdict for appellee. From the judgment and order overruling their motion for a new trial, appellants have taken this appeal.

The facts, as they appear from the transcript, are substantially these: On the twenty-ninth day of August, 1881, one Vail made a timber-culture entry for the land in question. On February 2, 1885, Vail conveyed said land by quitclaim deed to Luz R. Balsz, one of the appellants, who, with her husband, David Balsz, ever since the date of said deed, until after the commencement of this suit, was in the possession and occupancy of the whole thereof. In September, 1886, appellee filed a contest in the local land office against Vail's entry, and

on January 15, 1891, finally succeeded in having said entry canceled, and was thereupon notified by the land officers of his preference right to enter same, and did, on February 9, 1891, make a homestead filing upon the land, and receive the receiver's duplicate receipt therefor. Appellee then brought his suit for the possession of the land. At the trial the court admitted the duplicate receipt of the receiver in evidence, over objection, as evidence of title and right of possession in appellee, and instructed the jury that it constituted sufficient title in appellee to entitle him to recover in the action. The action of the court in admitting the duplicate receiver's receipt, and in instructing the jury, as above stated, are assigned as errors.

Assuming that Liebenow had a right to make a valid homestead entry upon the land in question, notwithstanding the occupancy of Balsz, and that the doctrine of *Atherton v. Fowler*, 96 U. S. 513, does not apply, the question still remains, Does the mere filing made by Liebenow under the Homestead Act, as evidenced by the receiver's duplicate receipt entitle him to maintain his action in ejectment? In many of the states and territories it has been provided by statute that certificates issued by registers of the land office, and receivers' receipts issued after final proof, shall be held to be *prima facie* evidence of title sufficient to support ejectment. Such certificates evidence an equitable title in the holders, and show that, having fully complied with the requirements of the law, the holders are entitled to patents from the government. But inasmuch as the legal title to public land remains in the government, even after final proof, until patent issues, and as delays often occur whereby the legal title may not for years be vested in the holder of such an equitable title, in order to protect the latter in his possession, the legislatures in many states have extended the action of ejectment to embrace such titles. There is a clear distinction to be observed between certificates issued after final proof and receipts issued by receivers or registers of the local land office, showing mere filings upon public lands under the various land acts. The former, as we have said, evidence the equitable title, while the latter are not evidence of any title. As was held by the supreme court of California in *Hemphill v. Davies*, 38 Cal. 577, in regard to the register's certificate

of the filing of a declaratory statement, such a certificate "is not a title." "It is merely an application—an offer—to purchase after the requisite proof of residence, qualification, etc., shall be made. When this is done, and payment is made, and the certificate of purchase is issued, then the purchaser acquires what is recognized by the laws of this state as title derived from the United States." A statute of the state of California was in force at the time that this decree was rendered in *Hemphill v. Davies*, which provided that "the certificate of purchase or of location of any lands in this state, issued or made in pursuance of any of the laws of the United States, or of this state, shall be deemed *prima facie* evidence of the legal title in the plaintiff." We have no statute which can be construed as giving the holder of such inchoate and uncertain claim to land as a duplicate receiver's receipt a right to dispossess one in the prior possession of land in a suit of this character. We have been cited to paragraph 3138 of the Revised Statutes as sustaining the contrary view. This paragraph provides that in the action of ejectment, under the plea of "Not guilty," the defendant may "give in evidence any testimony tending to show that the plaintiff is not entitled to such possession, or that the title is in some other person, other than the government." This statute goes no further than to recognize that one may maintain his action of ejectment, provided he has a right to the possession, even though the legal title be in the United States. Possibly, it may give the right to the holder of an equitable title evidenced by the certificate of a register of the local land office, issued upon final proof. At any rate, it does require of the plaintiff that he show a right to the possession, and falls very short of declaring that a mere naked filing as evidenced by a duplicate receiver's receipt, establishes that right. The land department has exclusive jurisdiction to determine all questions between conflicting claimants, at least until an equitable estate has vested in the entryman, and the courts cannot interfere by putting one claimant in possession and ousting another. If the United States cares to put an entryman in possession, it may undoubtedly do so by ejecting parties unlawfully in possession, but it does not confer upon the holder of a duplicate receiver's receipt this right. Of course, an entryman in possession may bring a possessory action, if ousted, to be returned

to his possession. He may do this upon the well-settled principle in ejectment that one in possession of land under claim of right cannot be dispossessed by one having no greater right.

We hold, therefore, that the court erred in its ruling in admitting the duplicate receiver's receipt as evidence of title, and instructing the jury that it was sufficient title upon which a recovery might be had. The cause is therefore reversed, and a new trial granted.

Hawkins, J., concurs.

Baker, C. J., did not take part in this case.

ROUSE, J., dissenting.—I cannot concur in the opinion in this case. Vail filed on the quarter-section of land described in the complaint under the provisions of the Timber Culture Act. After making said filing he granted to appellants the right to take possession of said land, and they took possession, and improved and fenced a part thereof, and were in possession of a part thereof under said right acquired of Vail at the time this suit was instituted. Appellants at no time made an effort to enter said land in their own right. Liebenow filed a contest against Vail's entry, and on a trial thereof before the register and receiver of the local land office Vail's entry was canceled. Vail appealed from that decision to the commissioner of the general land office, and the decision of the register and receiver was affirmed; and he appealed to the secretary of the interior, and the decision was again affirmed. Vail's right to said quarter-section was by the decision referred to canceled, and from that time he had no right thereto; and appellants, claiming from him, lost their right to said land at the same time. From that time they were in possession without right. By the decision in the contest, Liebenow obtained under the law, preference right over all others for a certain time to file on said quarter-section. Within that time he entered into possession of a part of said quarter-section not occupied by appellants, built a house and occupied it, and thereafter made a homestead filing on said quarter-section with the register and receiver of the local land office, paid those officers their fees for making the filing, and received their re-

ceipt therefor. Liebenow then instituted this action for the possession of said quarter-section.

Vail's entry of said land gave him the right to the possession thereof for the purpose of performing those acts required to be done by the Timber Culture Act, and he had the right to the possession thereof so long as his entry remained uncanceled. The right of possession is given by the government to the entryman, that he may fulfill the requirements of the law to perfect his title. *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847. The decision canceling Vail's entry terminated all his right to said land,—possession, as well as the right to acquire title thereto,—and with termination of his rights appellants' rights were at an end. The contest was an adjudication of the rights of Vail and Liebenow, and resulted in favor of the latter. He thereby acquired the right to enter said land. From the date of said decision, appellants, having no connection with the government title, were mere trespassers. The decision in the contest precluded them from connecting themselves with the government title, and gave that right to Liebenow. *Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290; *Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62; *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. 680; *Haven v. Haws*, 63 Cal. 514. Liebenow, after the contest, went upon a part of the quarter-section which was not occupied, built his house and occupied it, and then filed on the quarter-section. He had the right to file on all of it, and to have possession of all of the quarter-section. *Haven v. Haws* and *Whittaker v. Pendola*, *supra*. The right to occupy the public lands does not exist, excepting for the purpose of acquiring the title in compliance with the laws of the government.

Liebenow complied with the requirements of these laws, and then commenced an action in ejectment for the possession of the land. The statute of this territory for the trial of the right of property contains the following: "Par. 3135. The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises." "3138. The defendant may plead 'Not guilty' and under such plea give in evidence any testimony tending to show that the plaintiff is not entitled to such possession or that the title is in some other person other than the government. 3139. It shall be sufficient to entitle the plaintiff to recover to show at

the time the action was commenced the defendant was in possession of the premises claimed and that the plaintiff had a right to the possession thereof." "3134. The plea of not guilty or any other answer to the merits shall be an admission by the defendant for the purpose of that action that he was in possession of the premises sued for or that he claimed title thereto at the time the action was commenced." If plaintiff is legally entitled to the possession, he can maintain the action. The decision of the land officers gave Liebenow the right to enter the land. He made a settlement thereon, and then a homestead filing. Under the homestead entry, it was not only Liebenow's privilege to occupy the land, but it was his duty to do so. Liebenow was legally entitled to the possession. *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847; *Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290; *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. 680. By the plea in this case appellants admitted they were in possession. All, then, that appellee had to show to entitle him to a judgment was, that he had a right to the possession. Rev. Stats., par. 3139. Under the plea of "Not guilty," which was the plea entered in this case, a defendant may give in evidence testimony tending to show that the title is in some person other than the government. Rev. Stats., par. 3138. If the title is in the government, that is no defense to the action. Plaintiff can recover possession of land belonging to the government which is in possession of the defendant by showing that he is legally entitled to the possession. The right of possession is the gist of the action, and not title. By the contest the right of Vail to said land was determined. That decision was that he had no right thereto; that the land was subject to entry; that Liebenow had the preference right to enter the same; that no one could enter it until after the expiration of a certain number of days, excepting Liebenow. It was an adjudication of the matter by a competent tribunal, resulting in Liebenow's favor; and if he did not acquire the legal right to the possession thereof by complying with the provisions of the laws of the United States with reference to the entry of said quarter-section under the Homestead Act, it would be difficult to conceive what would be necessary to do in order to acquire a legal right thereto. If Liebenow is not entitled to the possession of said land against appellants, no one is; and they can remain in possession for all time with-

out any filing, and without even the right to make a filing. If Liebenow had gone upon said quarter-section and had made a homestead filing while appellants were in possession, before instituting a contest, he could not recover. The right to institute a contest before the proper tribunals is the mode to be pursued. When one person is in possession of public lands which another wishes to enter it is the only mode to be pursued. By a contest the proper tribunal determines whether the occupant is in possession by right, and if the decision be against him, another may acquire the right, by complying with the decision; and in all such cases the decision against the person in possession is in effect that he has no possession,—that he is a trespasser. *Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290; *Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62; *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. 680; *Haven v. Haws*, 63 Cal. 514. The judgment of the district court should be affirmed.

[Civil No. 376. Filed January 29, 1894.]

[36 Pac. 213.]

SANTIAGO AINSA, Administratrix with the Will Annexed of the Estate of FRANK ELY, Deceased, Plaintiff and Appellant, v. NEW MEXICO AND ARIZONA RAILROAD COMPANY, Defendant and Appellee.

1. **MEXICAN GRANTS — COURTS — JURISDICTION TO DETERMINE PRIVATE CLAIM TO LAND UNDER.**—A private claim to land in Arizona under an unconfirmed Mexican land grant cannot be contested in the local courts of justice where no proceedings are pending before Congress, the surveyor-general of the United States, or the private land court of March 3, 1891.
2. **SAME—TITLE—POWER TO SETTLE RESERVED BY CONGRESS—MUST BE CONFIRMED BEFORE LOCAL COURTS HAVE JURISDICTION.**—Congress has reserved to itself in Arizona the power of settling titles to Mexican land grants, and has delegated its power to the private land court. Congress must in some way confirm this class of grants before this court may have jurisdiction thereof.
3. **SAME—COURTS—JURISDICTION—NONE CONFERRED ON LOCAL COURTS BY 26 U. S. STATS. AT L. 854.**—The act of March 3, 1891, *supra*,

does not authorize this court to settle the title to Mexican land grants.

4. SAME—JUDICIAL NOTICE—EXECUTIVE ACTS—HOMESTEADS AND PRE-EMPTIONS.—This court must recognize and take judicial notice of the acts of the executive department of the government in allowing the entry of homesteads and pre-emptions in preference to the unconfirmed title of a Mexican land grant.

REVERSED. 175 U. S. 76, 44 L. Ed. 78, 20 Sup. Ct. Rep. 28.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Rochester Ford, and S. M. Franklin, for Appellant.

Under the Gadsden treaty complete title to land needed no legislative confirmation, and the owners of such titles may assert them in the ordinary form of law upon the documents under which they claim. *United States v. Pillerin*, 13 How. 9; *United States v. McCullagh*, 13 How. 216; *United States v. Roselius*, 15 How. 36; *Fremont v. United States*, 17 How. 553; *McGuire v. Tyler*, 8 Wall. 650; *Trenier v. Stewart*, 101 U. S. 797.

The grant under which plaintiff claims is a complete and perfect title and vested the fee in the grantee. *United States v. Turner*, 11 How. 663; *United States v. Watkins*, 97 U. S. 219; *Carpentier v. Montgomery*, 13 Wall. 480; *United States v. Knight's Admr.*, 1 Black, 227; *Phelan v. Poyorena*, 74 Cal. 448, 13 Pac. 681, 16 Pac. 241; *United States v. Pico*, 5 Wall. 538; *Malarin v. United States*, 1 Wall. 282; *United States v. Pacheco*, 22 How. 225; *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. Rep. 595.

William Herring, for Appellee.

HAWKINS, J.—This was an action filed in the district court of the first judicial district of the territory of Arizona in and for the county of Pima, on the first day of June, 1892, to quiet the plaintiff's title to the certain tract of land described in the complaint, known as and called the "Rancho San José De Sonoita," situate in the Sonoita Valley, in Pima

County, Arizona Territory, plaintiff's decedent claiming under a Mexican grant to Don Leon Herreros, dated May 25, 1825. Defendant claims a right of way through said premises by virtue of certain mesne conveyances from certain persons who had settled on portions of the lands conveyed by said grant, claiming same to be public lands of the United States. The cause was submitted to the court below on an agreed statement of facts showing: 1. The copy of the grant papers, and admitting that the same was made, executed, and delivered to the grantee named therein, and by the persons and officials when, where, and by whom it purports to have been signed, made, executed, and delivered; that the plaintiff (appellant) herein is the vendee and assignee of, and has acquired all the right, title, and interest of the original grantee thereof; 2. That claimant under said grant filed on December 29, 1879, under acts of Congress of July 22, 1854, and July 15, 1870, a petition for the confirmation of said grant; that said petition was never acted upon by Congress, and that at the institution of this suit no proceedings for the confirmation of said grant were pending before any surveyor-general of the United States, or before Congress, or before the court of private land claims created by act of Congress of March 3, 1891; 3. That prior to this action certain persons had entered upon land within the limits of plaintiff's grant as pre-emption or homestead settlers, claiming said lands to be public lands of the United States; that thereafter, and before the commencement of this suit, by condemnation proceedings against and sundry mesne conveyances from said persons, the defendant acquired and now claims a right of way through said several tracts of land so settled upon, which right of way is within the limits of the said grant. And the court held that it had no jurisdiction of the subject-matter of said suit, and dismissed plaintiff's complaint.

The record shows that the Mexican grant claimed by plaintiff had not been confirmed by Congress. The question for us to consider seems to be, Can a private claim to land in Arizona under an unconfirmed Mexican land grant be contested in the local courts of justice where no proceedings are pending before Congress, the surveyor-general of the United States, or the private land court of March 3, 1891? *Astiasaran v. Mining Co.*, 148 U. S. 80, 13 Sup. Ct. Rep. 457, settles

the question that no such action could be maintained if the claim had been reported to Congress by the surveyor-general, if commenced before Congress had acted thereon. But appellant contends that under the Gadsden treaty complete or perfect titles to land needed no legislative confirmation, and the owners of such titles may assert in the ordinary forms of law upon the documents under which they claim, and cites numerous authorities to support said position, all of which seem to us to be under different treaties, and where Congress had given the courts certain jurisdiction. Appellant also contends that the grant under which he claims is a complete and perfect title, and vested the fee in the grantee. Who is to decide this question? Under the treaty, Congress seems to have reserved this right to itself. It provided a mode of settling the property rights of these grants by acts of July 22, 1854, and July 15, 1870, and since by the act of March 3, 1891, (26 Stats. 854). It was the duty of Congress under the treaty to protect these rights. It could do so itself or delegate the power to the judicial department. *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525, and numerous cases therein reviewed. In the case of grants in the state of California this was done by Congress delegating its power to commissioners by act of March 3, 1851. In New Mexico and Arizona Congress reserved to itself the determination of such claims (sec. 8, 10 Stats. 309; 16 Stats. 304) until it passed the act of March 3, 1891, (26 Stats. 854). Appellant wants us to consider his grant as being under the provisions of section 8, or rather of the first paragraph of section 8, of the last-mentioned act; that is, one "that was complete and perfect when the United States acquired sovereignty," and not under section 6 of said act. Suppose we should do so, and order the title quieted, and some of the settlers thereon should get the attorney-general to commence an action in the land court against the owner of the grant under said section 8, and that court should hold said grant of no avail, then of what force would our decree be? Congress in providing a remedy for settling these disputed titles has nowhere delegated any authority to the courts to settle same. It has reserved to itself the power of settling such titles, and has delegated its power to the land court. It is not our province to usurp the functions of the "political department" of the government (*De La Croix v. Chamberlain*, 12 Wheat.

602) or of its delegate, the private land court. After proper confirmation, either by Congress or its land court, we could grant the relief asked for, and not till then. Why should we treat this grant as valid when it appears from the agreed statement of facts that the executive department has heretofore allowed homestead and pre-emption claimants to enter land embraced therein? Are we to say that department has been violating a treaty of the United States with Mexico? It was for Congress to pass laws for the enforcement of these treaties with Mexico. It has repeatedly done so. Acts July 22, 1854, (10 Stats. 309); July 15, 1870, (16 Stats. 304); Commissioners' Act, 1851, to settle such titles in California; and, finally, Act, March 3, 1891, (26 Stats. 854). If, as the appellant contends, the acts of 1854 and 1870 were repealed by act of March 3, 1891, still this last act does not authorize us to settle the title to Mexican land grants. He may still apply to Congress, if he does not want to apply to the land court. Congress must in some way confirm this class of Mexican grants before we have jurisdiction thereof. *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525. We must recognize and take judicial notice of the acts of the executive department of the government in allowing the entry of homesteads and pre-emptions in preference to the unconfirmed title of a Mexican land grant. The judgment is affirmed.

Baker, C. J., and Rouse, J., concur.

[Civil No. 384. Filed January 30, 1894.]

[36 Pac. 171.]

THE SALT RIVER CANAL COMPANY, Defendant and
Appellant, v. P. K. HICKEY, Plaintiff and Appellee.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—FAILURE TO FILE IN DUE TIME—LAWS ARIZ. 1893, ACT 9, CITED.—An objection that a bill of exceptions was not presented during the term, under act 9 of the Laws of 1893, the cause having been tried more than ten days before the end of the term, is well taken, and this court cannot consider the bill of exceptions on appeal, though settled and signed by the trial judge.

2. **SAME — JURISDICTION — MOTION TO DISMISS — FUNDAMENTAL ERROR CONSIDERED IN ABSENCE OF BILL OF EXCEPTIONS.**—Where a proper notice of appeal and bond have been given, a motion to dismiss cannot be sustained. In the absence of a bill of exceptions, the only error which can be considered is such as may go to the foundation of the action.
3. **STOCK AND STOCKHOLDERS—SALE OF STOCK BY CORPORATION—FAILURE TO TRANSFER ON CORPORATE BOOKS—DAMAGES—MEASURE OF.**—The buyer of capital stock from a corporation, having paid the contract price for the stock, in an action for damages for failure to deliver or transfer the stock on its corporate books, is entitled to recover the value of the stock at the time of the refusal of defendant to deliver the same, or its value at the time of its conversion, with legal interest from that time.
4. **PLEADING—DAMAGES—GROSS AMOUNT—EVIDENCE—ADMISSIBILITY.**—In actions sounding wholly in damages, where there is but a single cause of action, it is unnecessary to state in the complaint specifically the different elements of damage. It is enough to claim so much gross damages. Under the general allegation, the plaintiff may prove and recover those damages which necessarily result from the act complained of.
5. **SAME—COMPLAINT—SHOWING SALE OF STOCK BY CORPORATION FOR ASSESSMENT—PRESUMPTIONS.**—Allegations in a complaint against a corporation for damages for failure to deliver shares of stock sold by it to plaintiff, showing that the stock was sold by it for an assessment, does not render the complaint bad on demurrer, as it cannot be presumed that the capital stock was all paid up or that the corporation was not authorized to sell the stock.

ROUSE, J., dissenting.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, for Appellant.

Alexander & Stilwell, for Appellee.

HAWKINS, J.—Judgment was rendered in the court below on June 26, 1893. On June 27th appellant moved for a new trial. On July 5, 1893, this motion was overruled. The bill of exceptions was filed as settled on July 17, 1893. Appellee objected at that time to the proposed bill of exceptions, because not presented during the term (act 9, 1893), and for the

reason "said cause had been tried more than ten days before the end of the term." The transcript should show that the bill of exceptions was presented within the statutory time. These provisions of the statutes regarding bills of exceptions are mandatory. *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320. The fact of the judge settling same after the time, and not following the statute, does not make the same a bill of exceptions. The judge must follow the statute. *McGuire v. Newbill*, 58 Tex. 314. The certificate of the judge in the court below to the bill of exceptions is as follows: "And I, A. C. Baker, Judge, . . . do hereby certify that the above and foregoing bill of exceptions contains all the evidence taken upon the trial in said action, and because none of said testimony, rulings, motions, objections, and the exceptions thereto, appear upon the record and proceedings of said court, and the defendant having caused the above and foregoing bill of exceptions to be prepared and filed, and asking that the same may be signed so that it may become a part of the record, I have therefore settled, allowed, and signed the same, as the bill of exceptions in this cause, this 17th day of July, A. D. 1893." This action of the judge in allowing said bill was objected to by appellee "because not presented during the term, under act 9, 1893, said cause having been tried more than ten days before the end of the term." This objection was well taken, and we cannot consider the bill of exceptions in this appeal. *McGuire v. Newbill*, *supra*.

We cannot sustain the motion to dismiss the appeal, for the reason that a proper notice of appeal and bond have been given, and the only error we can consider is such as may go to the foundation of the action. *Rankert v. Clow*, 16 Tex. 13, 67 Am. Dec. 607; *Hollingsworth v. Holshausen*, 17 Tex. 47. The only one assigned is the overruling of the demurrer to the complaint. The allegations of the complaint, stripped of the evidential facts, are that on a certain day defendant (appellant) sold to plaintiff (appellee) for a valuable consideration one fourth interest in share No. 6 of the capital stock of defendant, and received payment therefor; that plaintiff thereby became the owner of such one fourth of share No. 6, and was entitled to a certificate of such ownership from defendant, and to the enjoyment of all the rights and privileges of such ownership; that he demanded of defendant his stock,

but defendant refused and neglected to issue to plaintiff a certificate of his ownership of said interest in share No. 6, or to transfer said interest to plaintiff's name on the books of defendant, or to permit the plaintiff to in any manner avail himself of his rights and privileges as owners thereof, whereby said interest in share No. 6 of the capital stock of defendant corporation became and was wholly lost to the plaintiff, to his damage in the sum of fifteen hundred dollars. To this complaint are a general demurrer and a general denial. The record does not show any action of the court below on the demurrer, but the judgment shows the cause was tried by the court on the issues framed, and the presumption would follow that defendant had waived his demurrer. But defendant having assigned the overruling of the demurrer as error, we will consider same. The complaint on its face, we think, is good. Plaintiff, having bought and paid for the stock, was certainly entitled to it or its value; that is to say, the buyer having paid the contract price for the stock in an action for damages, he is entitled to recover the value of the stock at the time of the refusal of defendant to deliver same to plaintiff, or its value at the time of its conversion by the seller. Field on Damages, par. 795. Mr. Justice Morton, in *Pierce v. Benjamin*, 14 Pick. 356, 25 Am. Dec. 396, remarks: "The general rule of damages, in actions of trover, is unquestionably the value of the property taken at the time of the conversion." This is the rule in most of the states, and where there is no claim for special damages. Mr. Justice Story thus announces: "I am of opinion that the rule is the value of the property at the market price at the time of the conversion." *Watt v. Potter*, 2 Mason, 77, Fed. Cas. No. 17,291. Mr. Chief Justice Terry, in *Douglass v. Kraft*, 9 Cal. 563, says: "The rule is, when the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of the conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of the conversion or at any time afterwards." The rule seems to vary in different states, but we think the weight of authority is in favor of the fixed rule,—i. e. the value of the property at the time of the conversion, with legal interest from that time; and under our system of pleading the complaint herein fully sets out a cause of action.

The allegation of the conversion or failure to deliver after consideration paid, on demand, and averring general damages, is sufficient. In actions sounding wholly in damages, where there is but a single cause of action, it is unnecessary to state in the complaint specifically the different elements which go to make up the sum total of the damages. It is enough to claim so much gross as damages. *Shepard v. Pratt*, 16 Kan. 209. Under the general allegation, the plaintiff may prove and recover those damages which necessarily result from the act complained of. *Burrell v. Salt Co.*, 14 Mich. 35. In *Roberts v. Graham*, 6 Wall. 578, Mr. Justice Swayne says: "Special, as contradistinguished from general, damages is that which is the natural, but not the necessary consequence of the act complained of." And practically the same rule applies if we consider the complaint as simply an action for damages for failure to deliver the stock after purchase. Benjamin on Sales, 2d Am. ed., par. 870. Nor do we think because the plaintiff set up the facts in his complaint, showing that the stock was sold by appellant for an assessment, made the same bad on demurrer. We cannot presume that defendant's capital stock was all paid up, or that it was not authorized to sell the stock. *Quaere*: If it was not authorized to sell the stock, could it do so, and retain the price? This would more properly come up on a trial of the cause on special pleadings. The judgment is affirmed.

Sloan, J., concurs.

ROUSE, J., dissenting.—I dissent from the opinion in this case for the reason that I think the complaint does not contain facts sufficient to constitute a cause of action, and the demurrer thereto should have been sustained. The complaint, commencing with the second division thereof, is as follows, viz.: "That on the 29th day of May, 1891, at a meeting of the board of directors of said corporation defendant, an assessment of sixty dollars per share was levied by resolution of said board on the capital stock of the said defendant, payable at the said office of the defendant within ten days from the 1st day of June, 1891, and that due notice of such assessment, and of the time and place for the payment thereof, was given to the stockholders of said corporation, in accordance with the

by-laws thereof, by publication of such notice for ten days in the Phoenix Daily Herald, a daily newspaper published in said county of Maricopa. (3) That by reason of the non-payment of the aforesaid assessment thereon, certain portions of the capital stock of the defendant became and were delinquent, and on the 12th day of June, 1891, were so declared to be delinquent, and a sale thereof ordered by the said board of directors, and in accordance with the charter and by-laws of said corporation, in payment of such delinquent assessment; and that thereafter said board of directors, by I. M. Christy, the secretary thereof, gave thirty days' notice of the time and place of sale of such delinquent stock by publication thereof in the aforesaid Phoenix Daily Herald. (4) That there was included in the delinquent stock so as aforesaid sold and advertised for sale in payment of the assessment due and unpaid thereon, a one-fourth ($\frac{1}{4}$) interest in share No. 6 of the capital stock of the defendant, which said interest was held and appeared on the books of the defendant in the name of the 'Mayor of the City of Phoenix, Trustee.' (5) That at the time and place mentioned in the aforesaid notice of sale, viz., on the twelfth day of July, 1891, at the office of the defendant, in said city of Phoenix, the said I. M. Christy, secretary as aforesaid, in pursuance of said notice, offered for sale, and sold to this plaintiff for the sum of seventeen dollars (\$17.00), lawful money, then and there paid by the plaintiff to the said Christy, the said one-fourth interest in share No. 6 of the capital stock of the defendant, then held and appearing on the books of the defendant in the name of the 'Mayor of the City of Phoenix, Trustee'; this plaintiff being then and there the highest bidder, and said sum of seventeen dollars the highest amount bid for said interest. (6) That, by reason of the premises, this plaintiff became and was on the said twelfth day of July, 1891, the lawful owner of said one-fourth ($\frac{1}{4}$) interest in share No. 6 of the capital stock of the defendant, and was then and is now entitled to a certificate of such ownership from the proper officers of the defendant, and to a transfer of said interest to his (the plaintiff's) name on the books of the defendant, and to the enjoyment of all the rights and privileges of such ownership; and it then became and still is the duty of the defendant, through its proper officers, to issue to this plaintiff a certifi-

cate of his ownership of said one-fourth ($\frac{1}{4}$) interest in share No. 6 of its capital stock, and to transfer said interest to plaintiff's name on the books of the defendant, and to accord to plaintiff all the rights and privileges of ownership thereof; but that, although often requested thereto by the plaintiff, the defendant, by the said I. M. Christy, as secretary as aforesaid, on the day last aforesaid, refused, and still does refuse and neglect, to issue to plaintiff a certificate of his ownership of said one-fourth ($\frac{1}{4}$) interest in said share No. 6, or to transfer said interest to plaintiff's name on the books of the defendant, or to permit this plaintiff to, in any manner, avail himself of his rights and privileges as the owner thereof, whereby said one-fourth ($\frac{1}{4}$) interest in share No. 6 of the capital stock of the defendant corporation has become and is wholly lost, to this plaintiff's damage in the sum of fifteen hundred dollars (\$1,500.00)."

It is alleged in the complaint that the defendant levied an assessment of sixty dollars per share on its capital stock, and that one-fourth interest of share No. 6 was sold and bought by plaintiff. It is further alleged that said one-fourth interest belonged to the "Mayor of the City of Phoenix, Trustee." The pleadings of plaintiff shall consist of a concise statement of the facts constituting the cause of action. The complaint must contain a statement of facts, which statement makes a cause of action. Rev. Stats., par. 655. If there be no cause of action stated in the complaint, there is nothing to try, and no judgment can be rendered thereon.

Corporations in this territory are formed only under a general law, and the provisions thereof must be complied with. Corporations have no powers excepting those conferred by the statute. Among the powers of such bodies are: "To render the shares or interests of stockholders transferable, and prescribe the mode of making such transfers. To establish by-laws . . . not inconsistent with the laws of this territory." Rev. Stats., par. 233. Before commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be acknowledged. Said articles are practically the charter of the corporation, and to them we must look for the authority for officers thereof to act. The articles must contain: ". . . 3. The amount of capital stock authorized, and the time when and condition upon which it is

to be paid in." Rev. Stats., par. 234. An assessment, as applied to the capital stock of a corporation, means an amount fixed equally upon all the shares of paid-up stock. Boone on Corporations, sec. 117; Beach on Private Corporations, sec. 590. Without authority specially conferred by statute, an assessment of the stock cannot be made. Beach on Private Corporations, sec. 590; Cook on Stock, Stockholders, and Corporation Law, sec. 422. The board of directors have no power to levy an assessment. The levy of an assessment, and the sale of the interest in the stock described in the complaint, were void acts, and the statement of such acts in the complaint did not state facts which constitute a cause of action, and the demurrer should have been sustained. We have no right to ignore the plain and oft-repeated statements in the complaint that the stock was sold for an assessment, and treat the proceedings as though a "call" had been made, and that the sale was made for such call. If we should do so, however, we will find ourselves confronted with difficulties equally as great as those with which we have been dealing. A call may be defined to be an official declaration by the proper authorities that the whole or a specific part of the subscriptions for stocks is required to be paid. Cook on Stock, Stockholders, and Corporation Law, sec. 104. It is a term used only when a demand is made on a subscriber for stock that he pay for the same either in whole or in part. The law requires that in the articles of incorporation the time when and conditions upon which the stock is to be paid up must be stated. Rev., Stats., par. 234. If the stock be not paid up, that fact must be shown by the articles referred to. If not paid up, a call may be made for the payment in whole or by installments as the same becomes due, as specified in said articles. The true meaning of a call, from what has been stated, is apparent. The term assessment is sometimes used in speaking of the amount of the call, but it is never used interchangeably with that term. To make this complaint good, if we should treat the term assessment as a call, there should have been in it allegations to the effect that the stock had not been paid up, that the amount was due, that all the prescribed steps to make it due and payable, as specified and required by the articles of incorporation, had been pursued by the proper officers. In other words, the complaint should have been based on the powers and rights enu-

merated in the said articles, and they should have been alleged, for in them alone the power to make a call must be lodged; otherwise, they do not exist. Again, a subscription for stock creates a debt, and a call is for a payment thereof, and becomes a debt due when made in the manner specified in the articles of a corporation, to be collected in the mode for the collection of such a debt. In this case, according to the allegations of the complaint, if we treat it as a call, the one-fourth interest in share No. 6 was forfeited and sold; it was confiscated. Plaintiff alleged that for seventeen dollars he bought said interest, and that by being deprived thereof he was damaged in the sum of fifteen hundred dollars. We have no right to look beyond the pleadings in this case to determine the question before us. If we should, however, we would find that for the paltry sum of seventeen dollars expended by appellee he had recovered damages for five hundred dollars and costs of suit.

This complaint must be tested by the same tests that would have to be applied if it had been a suit by a stockholder for stock which had been forfeited by the company and issued to another. To sustain this complaint is to decide that the company had the right to forfeit the stock described; to take the right from the owner and dispose of it to another. In effect, it is a decision that, under the facts stated in the complaint, and under no other facts, the directors of said company at the time of the pretended sale had the right to forfeit the shares of all the stockholders and to dispose of said shares to other parties. The right of recovery in the case is bottomed upon the right of the company at the time alleged to sell the stock. It is not an action against the parties for damages for selling property they had no right to sell. The complaint not containing facts showing the right to sell the stock, the demurrer should have been sustained and the case dismissed.

[Civil No. 895. Filed January 30, 1894.]

[35 Pac. 982.]

JUANA WALKER, a Minor, by ROSETTA JONES, her Guardian, Petitioner, v. THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT IN AND FOR PINAL COUNTY, and OWEN T. ROUSE, Judge of said Court, Respondent.

1. WRIT OF PROHIBITION—APPEAL—TO TEST JURISDICTION—ADEQUACY OF REMEDY BY APPEAL OR ERROR.—A writ of prohibition will not issue against the district court to prevent the hearing of an appeal from probate court for the reason of want of jurisdiction in said court to hear said appeal because of the failure to file a sufficient appeal-bond, the remedy by appeal or error being adequate in this case.
2. SAME—ADEQUACY OF REMEDY BY APPEAL—DETERMINED UPON APPLICATION.—If there are cases in which the remedy by appeal or error might not be considered adequate, that question, with the question of jurisdiction, should be left to be decided upon the application.
3. SAME—GROUNDS FOR—EXPENSE AND DELAY OF TRIAL AND APPEAL.—To be put to trial and then to appeal, with its attendant expense and delay, is no reason for granting a writ of prohibition.

PETITION for a Writ of Prohibition.

The facts are stated in the opinion.

Fitch & Campbell, and Bethune & McCabe, and J. B. Woodward, for Petitioner.

W. H. Barnes, Kibbey & Israel, and William R. Stone, for Respondent.

The writ of prohibition is an extraordinary writ, to issue only when there is no other adequate remedy. High on Extraordinary Remedies, sec. 762; *Thomas v. Mead*, 36 Mo. 232; *People v. Works*, 7 Wend. 486; *Ex parte Roundtree*, 51 Ala. 42; *Quimbo Appo v. People*, 20 N. Y. 531; *Maurer v. Mitchell*, 53 Cal. 289; *People v. Election Commissioners*, 54 Cal. 404; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.

It is not a writ of right, but it is discretionary with the

court having power to issue such writ, and the order refusing or granting the writ is not appealable. It should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law. It cannot be made to perform the functions of an appeal, a writ of error, or a *certiorari*, its purpose being to prevent any usurpation of jurisdiction. *Ex parte Gordon*, 1 Black, 503; *Ex parte Warmouth*, 17 Wall. 64; *Ex parte R. R. Ferry Co.*, 104 U. S. 519.

“The broad governing principle is, that prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or the matter before it.” It does not lie when the inferior court has jurisdiction to deal with the cause, however erroneous its decision may be. It issues only in cases of extreme necessity, and before it can be granted it must appear that the aggrieved party has applied in vain to the inferior court for relief. The jurisdiction is exercised by appellate or superior courts to restrain inferior courts from acting without authority of law. It does not lie for grievances which may be redressed in the ordinary course of judicial proceedings by appeal or writ of error. High on Extraordinary Remedies, secs. 765, 770, 771; *Wreden v. Superior Court of Stanislaus County*, 55 Cal. 504; *Washburn v. Phillips*, 2 Met. 296; *Supervisors of Bedford v. Wingfield*, 27 Gratt. 329; *State ex rel. Hernandez v. Monroe*, 33 La. Ann. 923; *Ex parte Hamilton*, 51 Ala. 62; *People v. Westbrook*, 89 N. Y. 152; *People v. Marine Ct.*, 36 Barb. 341.

It should not be granted except in a clear case of want of jurisdiction in the court whose action it is sought to prohibit. *Hart v. Tylor*, 61 Ga. 156.

It is never allowed except in cases of a usurpation of power, and not then unless other existing remedies are inadequate to afford relief. *State v. Braun*, 31 Wis. 600; *Ex parte Green*, 29 Ala. 52; *Ex parte Smith*, 34 Ala. 456; *Jack v. Adair*, 33 Ark. 161; *People v. Supervisors of Kern County*, 47 Cal. 81, 584.

It will not lie if the inferior court has jurisdiction of the subject-matter. *Ex parte Peterson*, 33 Ala. 74; *Ex parte State*, 51 Ala. 60; *Murphy v. Superior Court of Colusa County*, 58 Cal. 520; *Postlewaite v. Ghiselin*, 97 Mo. 424; *Wilson v. Berkstresser*, 45 Mo. 283; *Mastin v. Sloan*, 98 Mo. 252; *State*

ex rel. U. D. R. R. Co. v. Southern Ry. Co., 100 Mo. 59, 13 S. W. 398.

Jurisdiction of the subject-matter means the power to hear and determine cases of the class to which the proceeding belongs. *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646, 22 S. W. 877; *Musick v. Kansas City etc. Ry. Co.*, 114 Mo. 315, 21 S. W. 491; *Hope v. Blair*, 105 Mo. 93, 24 Am. St. Rep. 366, 16 S. W. 595; *Cooper v. Reynolds*, 10 Wall. 316.

The district court has jurisdiction of appeals from probate and justice of the peace courts. Rev. Stats. Ariz., sec. 1298.

BAKER, C. J.—In this matter there was an appeal taken from the probate court of Pinal County to said district court from a judgment finding the petitioner to be an heir at law of one John D. Walker, deceased. It is claimed that a sufficient bond on appeal was not filed, and therefore said district court acquired no jurisdiction to hear and determine such appeal. The petitioner appeared and moved said district court to dismiss the appeal for want of jurisdiction, and upon such petition being denied, and the appeal being about to be heard, she prays us to issue a writ of prohibition against said court to prevent the hearing of the appeal, for the reason of want of jurisdiction. The question of a want of jurisdiction in the supreme court to issue such a writ by virtue of its original jurisdiction was extensively argued at the hearing, but, inasmuch as the determination of that question is not necessary to the conclusion which we have reached, we do not express any opinion upon that subject. If the power exists in this court to issue the writ, the petitioner, we are convinced, has an adequate remedy by appeal or error from the action of the district court; and it is everywhere agreed that in such case the writ will not issue. Any other course, ordinarily, would bring all civil cases where jurisdictional questions are involved to this court by the writ, instead of appeal or error, a course not authorized by our practice. *People v. District Court*, 11 Colo. 574, 19 Pac. 541. There may be—we do not say there are—cases where the remedy by appeal or error might not be considered adequate, and the writ would issue; but even then we think that the question whether the remedy by appeal or error is adequate should be left, along with the question of jurisdiction, to be decided upon the application. 2 Spelling on

Extraordinary Relief, par. 1732. We are content to say the remedy by appeal or error, in this instance, is amply sufficient. The mere fact that to be put to trial and then to the appeal necessitates an expense and some delay is no answer to the conclusion. All litigation is, unhappily, attended with the same results. The writ is denied.

Sloan, J., and Hawkins, J., concur.

Rouse, J., not sitting.

[Civil No. 372. Filed January 30, 1894.]

[36 Pac. 32.]

BOARD OF REGENTS OF THE UNIVERSITY OF ARIZONA, Plaintiff and Appellant, v. MARY CHARLEBOIS, Defendant and Appellee.

1. SCHOOL LANDS—ACTION FOR POSSESSION—EVIDENCE.—In an action to recover the possession of school lands, it is necessary for the plaintiff to show an actual possession and ouster.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Henry C. Gooding, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, for Appellant.

Webster Street, for Appellee.

ROUSE, J.—This was an action for the possession of a portion of section 36, township 2 north, of range 2 east, of Gila and Salt River meridian, a school section, described in the complaint by metes and bounds, in Maricopa County, Arizona. It appears from the record in this case that one E. J. Edwards made a deed for said land to one George Marlow; that after the execution of said deed by Edwards to Marlow, Marlow died; that Charles Goldman and Oscar L. Gibbs were duly ap-

pointed administrators of his estate; that they received an order from the probate court of Maricopa to sell the interest of Marlow in said land, and that they did sell it under said order, treating Marlow's right thereto as a possessory right, and selling it as such, pursuing the course pointed out by the statutes and required in proceedings for the sale of personal property belonging to the estate of the decedent. The said right was purchased by one F. A. Gully, and thereafter said Gully and wife deeded said property to the appellant. The complaint was regular in form, and appellee pleaded not guilty thereto.

On the trial exceptions were taken by appellant to the ruling of the court in admitting in evidence in behalf of appellee improper testimony, and in refusing to give certain instructions asked by appellant, and in giving certain instructions at the request of appellee, and in giving certain instructions on its own motion. All the testimony given on the trial is not preserved in the bill of exceptions, and it is impossible for us to determine whether the errors complained of, many of which are apparent, were material. It is shown by the record that the title to the land described is in the United States; that the contest is over the right of possession. The record does not show that appellant, in its right, or by any one from whom it claims, has at any time had actual possession of the land. Appellant and appellee claim through a common source, and it does not appear which first acquired *pedis possessio*. In fact, we do not learn from the record that any one from whom appellant claims, excepting Marlow, was ever in possession of the land. Appellee claims possession, too, through Marlow; and while the evidence does not show when the appellee went into possession, the pleadings do show that she was in possession at the time the suit was commenced. It is not necessary that we should consider the many questions urged as errors by appellant, inasmuch as, from the record, the judgment must be affirmed, as it was necessary for appellant to show an actual possession, and that it had been ousted, before it could recover; and it is so ordered.

Sloan, J., and Hawkins, J., concur.

Baker, C. J., did not take part in this case.

[Civil No. 419. Filed January 30, 1894.]

[36 Pac. 176.]

J. J. FISHER, Complainant, v. DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, TERRITORY OF ARIZONA, IN AND FOR YAVAPAI COUNTY, Respondent.

1. EMINENT DOMAIN—RIGHT OF DEFENDANT TO COMPENSATION PAID IN UNDER REV. STATS. ARIZ. 1887, PAR. 1778, PENDING APPEAL.—The statute, *supra*, provides in substance that a plaintiff who succeeds in condemning property may, pending an appeal, obtain possession of the same upon paying into court for the defendant the amount of compensation, as determined by the jury, which the defendant is entitled to have paid over to him upon filing the proper receipt and an abandonment of defenses to the action other than as to the amount of compensation. When the latter have been done, and the plaintiff has been let into possession, it is made mandatory upon the court to order the payment of the money, and the court below exceeded its authority in directing the money paid in by plaintiff be retained by the clerk pending the appeal, and in denying the order prayed by defendant, he having complied with the statute.

ORIGINAL PETITION for Writ of Certiorari. Granted.

The facts are stated in the opinion.

Baldwin & Johnson, for Appellant.

Herndon & Norris, for Appellee.

SLOAN, J.—On the application of J. J. Fisher, this court issued a writ of certiorari directed to the district court, fourth judicial district, in and for Yavapai County, commanding the latter to certify up the proceedings had subsequent to judgment in the case of Santa Fe, Prescott, and Phoenix Railway Company, plaintiff, v. J. J. Fisher, John Martin, J. W. Dougherty, R. M. Ling, and Levi Bashford, defendants. The record, as certified in return of the writ, shows that the plaintiff in the above-entitled case brought suit in said court for the condemnation of a right of way for its railroad across certain mining claims owned by the said defendants as tenants

in common. Upon the trial, the damages, as assessed by the jury, exclusive of the cost of fences and cattle-guards as found, were \$1,820.85. Judgment was entered in accordance with the finding of the jury. The plaintiff appealed from the judgment to this court, which appeal is still pending. After judgment the plaintiff gave bond under the statutes for double the amount of the assessed cost of constructing the fences and cattle-guards, and paid into court the amount found as compensation,—viz., \$1,820.85,—together with a further sum, to cover costs and further damages should any afterwards be found, and obtained an order from the court letting it into possession of the land condemned in the suit. Thereupon the defendants filed their receipt for the \$1,820.85, together with a written abandonment of all defenses to the action except as to the amount of damages that they might be found to be entitled to in the event that a new trial should be granted, and applied to the court for an order directing that the \$1,820.85 be paid over to them. The court denied this application, and directed that the money remain in the hands of the clerk pending the appeal.

It is provided in section 18 of the Eminent Domain Act (Rev. Stats. par. 1778) that “at any time after trial and judgment entered, or pending an appeal from the judgment of the supreme court, whenever the plaintiff shall have paid into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceedings, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the district court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff if already in possession to continue therein, and if not, then to take possession of and use the property during and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant who is entitled to the money paid into court for him upon any judgment shall be entitled to demand and receive the same at any time thereafter, upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to

order and direct that the money, so paid into court for him, be delivered to him upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted." This section of the statute recognizes the established principle of all condemnation proceedings,—that private property cannot be taken for a public use without just compensation be first paid to the owner. Proceeding upon this principle, it provides, in substance, that a plaintiff who succeeds in condemning property may, pending an appeal, obtain possession of the same. But, to do so, he is first required to pay into court for the defendant the amount of the compensation as determined by the jury. The right to possession and the right to the compensation are made mutual. The latter is not secured merely upon payment of the money into court. The defendant is entitled to have it paid over to him upon a compliance on his part with the terms of the statute as to filing the proper receipt and abandonment of defenses to the action other than as to the amount of compensation. When the latter have been done, and the plaintiff has been let into possession, it is made mandatory upon the court to order the payment of the money. It follows, therefore, that the money paid into court by the Santa Fe, Prescott, and Phoenix Railway Company, or so much thereof as was found by the jury to be due the defendants in the way of compensation for the land condemned, was held by the court for the use of the defendants, to be paid them upon proper application, and that the defendants, having complied with the statute and filed the proper receipt, were entitled to the order directing its payment. The court below, therefore, exceeded its authority in directing that the money be retained by the clerk pending the appeal and in denying the order applied for. It is therefore ordered that the court below grant the application of defendants and enter its order directing the payment to them of the \$1,820.85.

Baker, C. J., and Rouse, J., concur.

[Civil No. 81. Filed March 8, 1894.]

[36 Pac. 209.]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
WILLIAM R. EVANS, Defendant and Appellant.

1. CRIMINAL LAW—INDICTMENT—ASSAULT WITH INTENT TO COMMIT MURDER—ASSAULT WITH DEADLY WEAPON—SUFFICIENCY OF INDICTMENT FOR FORMER OFFENSE TO SUSTAIN CONVICTION FOR LATTER—WEST v. TERRITORY, ANTE, p. 212 FOLLOWED.—In an indictment charging appellant with “an assault to commit murder” the crime was designated “felony,” and the kind of instrument or weapon with which the assault was made was described, and the mode and manner in which it was used. As described and used, the weapon was a deadly weapon. Under the indictment, a verdict was properly returned finding appellant guilty of an assault with a deadly weapon. Following *West v. Territory, supra*.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge. Affirmed.

Reese M. Ling, for Appellant.

Francis J. Heney, Attorney-General, for Respondent.

ROUSE, J.—Appellant was indicted and tried for the crime of “an assault to commit murder,” and a verdict was returned, finding him guilty of “an assault with a deadly weapon.” Judgment was pronounced against appellant on said verdict, and he contends that he was found guilty of a crime not charged in the indictment, and asks for a reversal of the judgment for that reason. In the indictment the crime was designated as a “felony,” and the kind of instrument or weapon with which the assault was made was described and the mode in which it was used. As described and used, the weapon was a deadly weapon. The facts of this case make the decision in the case of *West v. Territory* (decided at this term) *ante*, p. 212, 36 Pac. 207, applicable. The judgment of the district court should be affirmed, and is so ordered.

Baker, C. J., and Sloan, J., concur.

[Civil No. 405. Filed March 8, 1894.]

[36 Pac. 216.]

**THE SANTA FE, PRESCOTT, AND PHOENIX RAILWAY
COMPANY, Defendant and Appellant, v. JOSEPH
HURLEY, Plaintiff and Appellee.**

1. **PLEADING—NEGLIGENCE—AMBIGUITY—CONSTRUCTION.**—Allegations in a complaint for personal injuries which recite that the pile-driver at which plaintiff was employed was, as it was then used and managed by the defendant, unsafe, defective, and insecure, and being so unsafe and insecure was so unskillfully and in such unsafe manner operated by defendant that the weight used in said pile-driver escaped from its fastenings and injured plaintiff, will be construed as allegations of negligence in using defective machinery, this being the inherent force of the complaint, to save it from confusion and to render it reasonably clear and intelligible.
2. **SAME—COMMINGLING OF SEPARATE CAUSES OF ACTION—CONSTRUCTION.**—Where a complaint contains words which, if properly arranged, might state two causes of action, it will be construed as stating only the one principally intended.
3. **SAME—EVIDENCE—ADMISSIBILITY—CONFORMITY TO ISSUE.**—In an action for personal injuries, where the negligence alleged is the use of defective machinery, evidence that the injury was caused by an unmanageable team of horses used in operating the machinery is inadmissible and is reversible error.
4. **NEGLIGENCE — PLEADING — DEFECTIVE MACHINERY — UNMANAGEABLE HORSES NOT.**—Conceding that the complaint is to be construed as a general allegation of negligence in the use of defective machinery, without specifying any particular defect, still the judgment must be reversed, for the reason that the unmanageable team of horses was in no sense "machinery."
5. **PLEADING—ISSUES—NOT TO BE RAISED BY EVIDENCE—RECOVERY MUST BE UPON ISSUES RAISED BY PLEADINGS.**—The broad and comprehensive liberality of our system of code pleading was not designed to enable a party to raise issues for the first time by the evidence, or to recover upon an issue other than the one stated in the pleadings.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

Baldwin & Johnston, for Appellant.

The complaint is susceptible of two wholly different constructions:—

First—That the pile-driver was unsafe, defective, and insecure, and that the defendant had notice thereof; and.

Second—That the pile-driver was carelessly, negligently, and unskillfully operated.

The allegations of the amended complaint being as already stated, the court admitted evidence not of a defective pile-driver or its negligent operation, but admitted evidence of unmanageable horses. This was error. The plaintiff could only recover upon the facts alleged. *McPherson v. Pacific Bridge Co.*, 20 Or. 486, 26 Pac. 560; *Woodworth v. Oregon R. and N. Co.*, 18 Or. 289, 22 Pac. 1076; *St. Louis etc. R. R. Co. v. Fudge*, 39 Kan. 543, 18 Pac. 720; *Heilbroner v. Hancock*, 33 Tex. 714; *Atchison-Topeka R. R. Co. v. Irwin*, 35 Kan. 288, 10 Pac. 820; *Waldhier v. Railroad Co.*, 71 Mo. 514; *Coal Co. v. Wilson*, 47 Kan. 460, 28 Pac. 178; *Edens v. Railroad Co.*, 72 Mo. 212; *Trewatha v. Mining Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Field v. Railroad Co.*, 76 Mo. 614.

J. F. Wilson, and Herndon & Hawkins, for Appellee.

BAKER, C. J.—The suit was commenced to recover damages for personal injuries. It is alleged, in substance, that the appellee was employed by appellant as a “brace” or “spud” holder about a certain pile-driver, at the time being used in the construction of appellant’s railroad, and that, while so employed, his hand and a portion of his arm were cut off through the negligence of appellant. The appellee recovered a judgment for thirteen thousand dollars damages against the corporation, and it appeals. There are numerous errors assigned, one of which we will now consider. The following portion of the complaint is necessary to a correct understanding of our conclusions: “That the said pile-driver, at which plaintiff was so placed as the said employee of said defendant, and as such brace or spud holder in the operation of the same, was, as it was then used and managed by the defendant by and through its superintending foreman and managing agent, unsafe, defective, and insecure, of all of which defendant at the time had notice, and plaintiff did not have notice; and that

the same, being so unsafe and insecure, as aforesaid, was by the defendant, then and there acting by and through its superintending agent and foreman over the operation of said pile-driver, so carelessly, negligently, and unskillfully, and in such unsafe and insecure manner used and operated, and while the same was in the service of the defendant as aforesaid in the construction of its said railroad as aforesaid, and without any carelessness or negligence of plaintiff, that the weight used in the connection with the operation of said pile-driver escaped from its fastenings, and fell with such force upon the right hand and arm of plaintiff, where he was engaged at work at his assigned post of duty, that it severed his right hand and arm from his body."

The natural inquiry is, What was the cause of the injury? The complaint must answer the question in the first instance. We look to that because it is the means designed by our judicial system to apprise both the court and the parties of the precise subject of controversy. In construing its language we should make every reasonable intendment, and read and apply the terms in their natural and usual sense, and sustain the pleading, if possible. The whole pleading should receive such a construction as will avoid attributing to it misleading statements. Now, taking the words in their ordinary and usual sense, their meaning is, that the injury was the immediate result of the weight escaping from its fastening and falling upon the plaintiff's hand and arm. The reasonable intendments are, that it escaped because it was insecurely fastened, and that for that reason it was defective and unsafe, and, being so, the defendant used it. This is the inherent force of the whole complaint. The expressions "as it was then used and managed by the defendant" and "in such unsafe and insecure manner used and operated" refer to, and are to be confined to, the insecurely fastened weight; otherwise, the complaint is justly liable to the charge of it being impossible to determine whether the negligence consisted of some distinct act in merely operating the machine, or in using and maintaining defective machinery itself, and either one or the other ought to be clearly set out. The counsel for appellee contend in their brief that negligence both in operating or running the machinery and in having or using defective machinery itself is charged. If so, good pleading would require that they be

separately stated. It is quite impossible in this instance to tell where the one begins and the other ends. A sample of comingling these charges in one count is found in *Waldhier v. Railroad Co.*, 71 Mo. 514. Where a complaint contains words which, if properly arranged, might state two causes of action, it will be construed as stating only the one principally intended. *Sharp v. Miller*, 54 Cal. 329. We think the allegation is negligence in using defective machinery,—defective in the particular of the weight not being securely fastened. This reading of the complaint is the only one to save it from utter confusion and make it reasonably clear and intelligible, and we therefore adopt it. The machine was operated by means of a rope attached to the weight, and reeved in a double and single block, going from double block at head of the driver to snatch-block below, then to a team of horses. These horses raised the weight to a point where it “tripped” for its descent down the leads, which are made to guide it to the pile standing between the leads, ready for driving into the earth, and strikes it fairly upon the head. It has a drop of twenty-seven feet, and weight 2,050 pounds. The horses are required to stop when the weight trips, or the machine is pulled out of position, and accidents become possible. The plaintiff’s duty was to hold the pile steady by means of a brace or spud, and prevent it from striking against the leads, and he was standing upon the bed plate discharging this duty when the misfortune occurred. He was permitted to show, over the objections of the defendant, that the horses, instead of stopping when the weight “tripped,” became fractious and unmanageable and “jumped” or “jerked,” and continued to pull upon the rope, and forced the pile-driver out of its proper position, jerked its foot away from the foot of the pile, and caused it to assume an oblique position, so that the weight descending the leads struck the pile at an angle instead of upon its top, and broke it off, catching the plaintiff’s hand and arm between it and the bed-timbers of the pile-driver, where he had fallen, or partially fallen, having lost his balance because of the reeling or swaying of the machine, and mashing off the hand and a part of the arm. The witnesses T. J. George, T. G. George, G. M. Brown, and R. M. Brown all gave evidence of this character. It is quite clear from all the evidence that the weight did not escape from its fastenings in the sense of having been

insecurely fastened. It is equally clear that it tripped and descended the leads at the time and in the manner provided for in the construction of the machine. The witnesses repeatedly testified that the accident was caused by the horses becoming unmanageable or fractious, or being wild and unfit for such service, and pulling too far, and not stopping when the weight "tripped." Thus the plaintiff was suffered to prove another and different act of negligence (if such fact was negligence, which we do not decide) than the one set out in the complaint. The rule is very well established that, if the plaintiff specifically plead the act or acts constituting the defendant's negligence, he cannot prove other and different act or acts for the purpose of substantiating his complaint. Black on Proof and Pleadings, sec. 140, and note; *Batterson v. Railway Co.*, 49 Mich. 184, 13 N. W. 508; *Cherokee etc. Min. Co. v. Wilson*, 47 Kan. 460, 28 Pac. 178; *Woodward v. Navigation Co.*, 18 Or. 289, 22 Pac. 1076; *Atchison etc. R. R. Co. v. Irwin*, 35 Kan. 288, 10 Pac. 820. This was prejudicial error, and calls for a reversal of the judgment. It has been pointed out to us that there is some evidence in the record to the effect that there was no suitable hook to the rope, so that the horses could be instantly unhooked from the machine upon the tripping of the weight. This is so, but it is apparent that such testimony was incidentally given, and was not relied upon by the plaintiff as being the act constituting the supposed negligence. We cannot so believe in the light of the complaint, which, as we have seen, descends to particulars but fails to specify this circumstance. Besides, it is questionable if the absence of a hook at such a place had anything to do with the injury under the evidence as it appears in the record. The testimony is, that the horses "jerked," "jumped." There was no time to unhitch any hook.

There is another view of the case equally fatal to the judgment. Conceding that the complaint is to be construed as a general allegation of negligence in the use of defective machinery, without specifying any particular defect, still the judgment must be reversed, for the reason that the unmanageable team of horses was in no sense "machinery." This has been directly decided. *McPherson v. Bridge Co.*, 20 Or. 486, 26 Pac. 560.

We are not unmindful of the broad and comprehensive

liberality of our system of code pleading, but that system was never designed to enable a party to raise issues for the first time by the evidence, or to recover upon an issue other than the one stated in the pleadings. The judgment is reversed, and the case remanded for a new trial.

Sloan, J., and Rouse, J., concur.

[Civil No. 378. Filed March 8, 1894.]

[36 Pac. 918.]

WILLIAM CHRISTY, Defendant and Appellant, v. DELOS
ARNOLD, Plaintiff and Appellee.

1. APPEAL AND ERROR — ASSIGNMENTS OF ERROR — INSUFFICIENCY — MARKS v. NEWMARK, 3 ARIZ. 224, 28 PAC. 690, CITED—RULE ENTERED JANUARY TERM, 1893—WAIVER BY FAILURE TO OBJECT AND ARGUE.—Ordinarily, when assignments of error are too general, and are insufficient in that they fail to designate and specially point out any error in the record for our consideration, this court will be justified in affirming the judgment upon the ground that appellant has failed to comply with the decisions and rules of this court relating thereto. *Marks v. Newmark, supra*, and rule, *supra*, cited. But where no objection is made by appellee thereto, and the questions raised have been argued at length, the court is disposed to consider the questions as though they had been properly presented in the assignment of errors.
2. CONTRACT—CONVEYANCE OF LAND—EVIDENCE—DEFAULT OR RESCISSION—SALE TO THIRD PARTIES AND STATEMENT THAT CONTRACT IS FORFEITED SUFFICIENT EVIDENCE OF RESCISSION.—Plaintiff and defendant entered into a contract whereby defendant was to secure title to certain land and deed same to plaintiff for fourteen thousand dollars. Plaintiff was to pay two thousand five hundred dollars to defendant as part payment, which was duly paid, the balance to be paid when title was acquired and conveyed to plaintiff. Plaintiff stood ready to pay for a considerable time, and then urged defendant to sell his interest, as he did not wish to hold his money idle while defendant was procuring title. Later, when defendant had procured title, plaintiff asked defendant to sell the land or deed him a *pro rata* for the amount paid. This request defendant refused, but offered to take the two thousand five hundred dollars already paid, cancel the contract, and keep the land. Plaintiff asked for a few days to consider the proposition. This ended negotiations,

and two months later defendant sold the land to other parties. Plaintiff then wrote defendant that he had been informed that defendant claimed he had forfeited his contract, and protested he had not, to which defendant answered that he considered the contract forfeited from the time of the last negotiations. Under the evidence as stated, the case does not turn upon whether plaintiff or defendant was in default in carrying out the terms of their contract, but upon the question whether the contract was rescinded and by whom. The sale of the land by defendant, with his admission that he considered the contract forfeited, is sufficient evidence of a rescission by him.

3. **SAME—SAME—FORFEITURES.**—Where a contract does not contain any provision that the amount paid shall be held as a forfeit in case of default of the vendee in the completion of his contract, none can be enforced.
4. **SAME—SAME—RESCISSION—RECOVERY OF MONEY PAID.**—The effect of the rescission of the contract by defendant, even if plaintiff was in default, was to render the former liable for the return of the two thousand five hundred dollars received by him from the latter.
5. **SAME — SAME — PLEADING — RECOUPMENT — REV. STATS. ARIZ. 1887, PARS. 736, 737, 742, CONSTRUED.**—An answer to a complaint for the recovery of a part payment on a contract rescinded by defendant, averring that the part payment had profited defendant nothing, is not such a pleading as to entitle defendant to prove and be allowed damages as a set-off to plaintiff's demand, as the statutes, *supra*, require defendant to set up his counterclaim based on such damage, and state therein distinctly the nature of the damage sustained, so that the plaintiff can have "full notice of the character thereof."
6. **COUNTERCLAIM—RECOUPMENT—REV. STATS. ARIZ. 1887, PARS. 736, 737, 742, CONSTRUED.**—Counterclaim as used in statutes, *supra*, embraces recoupment.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

Cox & Street, E. J. Edwards, and J. F. Moriarty, for Appellant.

Thomas Armstrong, Jr., for Appellee.

Refusal to fulfill the contract must be absolute to be tantamount to an assent to its dissolution; and to authorize the other party to rescind it, such refusal must be in no way quali-

fied, and should substantially amount to an avowed determination of the party not to abide by the contract. *Fay v. Oliver*, 20 Vt. 718, 49 Am. Dec. 765.

Christy's action in selling the land to third parties is altogether inconsistent with a fulfillment of the contract on his part, and can be viewed in no other light than as a relinquishment by him of the contract, and puts beyond doubt Arnold's right to recover his money. *Gillett v. Maynard*, 5 Johns. 85, 4 Am. Dec. 328, approved in *Burton v. Driggs*, 20 Wall. 137.

A party desiring to rescind a contract must rescind *in toto* so as to place the adverse party in *statu quo*. *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614.

The appellant Christy, having elected to rescind the contract, was bound to return the money, particularly since the contract provided for the return, and no demand therefor by Arnold was necessary. *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749.

To defeat Arnold's recovery the appellant Christy should be ready and willing to perform his part of the contract. *Bradford v. Parkhurst*, 96 Cal. 102, 31 Am. St. Rep. 189, 30 Pac. 1106.

When a contract of sale and purchase of lands is abandoned or rescinded by the parties as in this case, the vendee, though in fault, may recover back installments paid, less the actual damage of the vendor occasioned by his breach of the contract. *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774.

And this doctrine applies as well to contracts providing for a forfeiture to vendor of such advance payments in the event of vendee's default. *Shively v. Lomi Tropic Land etc. Co.*, (Cal.) 33 Pac. 849.

How much more clear is Arnold's right to recover when there is not only no default on his part, but the contract itself provides for the return of the money paid by him?

SLOAN, J.—Ordinarily, this court would be justified in affirming the judgment in this case upon the ground that appellant has failed to comply with the decisions and rules of this court in reference to assignments of error. The assignments are too general, and are insufficient, in that they fail to designate and specifically point out any error in the record for our consideration. *Marks v. Newmark*, 3 Ariz. 224, 28

Pac. 960. See, also, rule of this court entered at January term, 1893. As no objection has been made by counsel for appellee to any of these assignments, and as he has at length argued the questions raised by counsel for appellant, we are likewise disposed to consider these questions as though they had been properly presented in the assignments of error.

The facts of the case are these: On May 21, 1887, the appellant, William Christy, who resides in the city of Phoenix, and the appellee, Delos Arnold, who resides in Pasadena, in the state of California, entered into a written agreement, of which the following is a copy:—

“This agreement between Wm. Christy of Phoenix, Arizona, and Delos Arnold of Pasadena, Calif., is as follows: Wm. Christy promises to pay all expenses, and patent Sec. 13, T. 2, N. R. 1 E. Gila and Salt River M. (said Sec. 13 being located about ten miles north from Phoenix, Arizona, in a N. W. direction), and deed the same to said Arnold for fourteen thousand dollars. On or before ninety days from this date, said Arnold promises to pay said Christy twenty-five hundred dollars as part payment on this contract. And if said Christy fails to get final papers and deed said lands to said Arnold, then said Christy is to return said Arnold the above-mentioned twenty-five hundred dollars. And it is further agreed that when the title to said Sec. 13 is acquired, and conveyed to said Arnold, then the said Arnold shall pay to the said Christy the final sum of eleven thousand five hundred dollars, and said Arnold is to be at no expense in procuring above title. May 21, '89. WM. CHRISTY. DELOS ARNOLD.

“Eight water-rights in the Arizona Canal to go with the above-described land, and are to be deeded to the land and become a part of the same. WM. CHRISTY.”

It appears that the title to the land described in the contract was not, at the time of its execution, in Christy, but the same was desert land, held under the Desert Land Act, in the names of certain third persons. It appears, also, that, pursuant to the agreement, appellee, Arnold, in August, 1887, paid to appellant, Christy, twenty-five hundred dollars. The letters of the parties afford the evidence of their subsequent conduct relative to the contract. The substance of this correspondence only is important. On October 22, 1887, Christy wrote to Arnold that he would be ready to convey title to the

land after December 7th next ensuing, and that he would then expect the balance to be paid by Arnold under the contract. On December 3d Christy wrote to Arnold that, owing to failure to get the land ready for final proof by December 7th, he had asked the land office to extend the time till December 22d. On December 12th, Christy again wrote Arnold that a readvertisement would be necessary before the final proof could be taken, which would take five or six weeks' time. On December 17th, Arnold, in reply to Christy's letter of December 12th, wrote that he had made a special effort to get funds to meet his payment under his contract, and disliked to have his money lie idle, and suggested that Christy sell the land, and thus relieve him from further care in relation thereto. In reply to this letter, Christy, on December 21st, wrote that January 27th had been set as the day for taking final proof, and suggested that Arnold hold on under the contract. On December 27th Arnold again wrote Christy, urging the latter to dispose of his interest in the land, as he did not "want to raise the funds again for that amount." In reply, Christy wrote that final proof would be made by February 1st, and final receipts would be issued by the last of February, at which time he would expect the money due. In the mean time he would try to sell Arnold's interest for him. Various letters passed between the parties relative to the land after February,—those of Christy for the most part excusing delay in the procurement of title, and those of Arnold for the most part urging Christy to sell his interest, and complaining of difficulty in getting ready for payment when title could be had. Finally, on May 22, 1888, Christy wrote to Arnold that he had received the certificates from the land office, and asking Arnold to come to Phoenix and adjust the matter to the relief of both. Christy, on June 1st, again wrote that he could not buy back Arnold's interest under the contract, and again urged the latter to come to Phoenix and settle the matter. On June 8th Arnold wrote asking Christy to sell the land, or deed him a *pro rata* amount of the land, according to the amount of money he had paid under the contract. Christy replied to this, declining the proposition of Arnold, and proposing to take the twenty-five hundred dollars already paid, cancel the contract, and keep the land. On June 21st Arnold wrote asking for a few days' time in which to consider the

latter proposition of Christy, and to correspond with parties in the east in relation to the matter. On July 16th Christy again wrote and renewed the proposition of June 16th. In reply Arnold wrote that he had not yet heard from the parties in the east, and would wait a few days and then determine what he would do. There was no further correspondence between the parties for some time after that. The testimony shows that Christy, on August 17, 1888, sold the land to the other parties. On February 20, 1889, Arnold wrote Christy that he had been informed that the latter claimed that he had forfeited his contract, and protested that he had not, and inquired if the information was true. In reply Christy wrote Arnold as follows: "Your favor 21 Feb. rec'd. Mr. McBride wrote me, and asked if you had forfeited your right to Sec. 13. I could not tell him anything else than what I did. I wrote you last May that I was ready to comply with the contract, and you replied that you could not raise the money. I then made you a proposition to deed it, and take a mortgage for \$8,000, at 15 per cent., which you refused to do. I then wrote you that I would take the land and relieve you of the contract, which you never replied to. I considered the contract forfeited from that time, and so consider it now." This ended the correspondence. Arnold then brought this suit to recover the twenty-five hundred dollars paid by him to Christy under the contract. In his complaint Arnold alleges the execution of the contract, and the payment of the twenty-five hundred dollars under it, and that Christy had repudiated the contract, and without his consent canceled the same, and, although demanded so to do, had refused to return the money paid by him. Christy in his answer, after a general denial, pleaded a breach of the contract on the part of Arnold, and in addition pleaded "that the whole of the \$2,500 received by him from said plaintiff was expended by him for plaintiff in making the arrangements aforesaid, by which plaintiff might have obtained title to the land; but, plaintiff failing as aforesaid to pay the balance of the money to obtain a title and the evidence thereof, he lost the benefit of such expenditure, and defendant was profited nothing thereby." The cause was tried by the court without the aid of a jury, and judgment rendered for plaintiff for the twenty-five hundred dollars, and costs of suit.

In reviewing the evidence, we are, of course, not called upon to weigh it for the purpose of determining its preponderance upon any disputed question. We are only concerned whether the judgment is supported by any reasonable conclusion of fact which may be gathered from it. As we view the law, this case does not turn upon the question, as counsel for appellant contend, whether Christy or Arnold was in default in carrying out the terms of their contract. Considering the contract in the light of the evidence, even if the case did so turn, we could not say that the default of Arnold rather than that of Christy is established with such clearness as that the judgment for that reason should be reversed. The case does, in our judgment, turn upon the question whether the contract was rescinded, and by whom. As to the latter question, the evidence does show that Christy, in the year 1888, sold the land to other parties. This might in itself have constituted a rescission. In addition, however, in his letter to Arnold of February 9, 1889, which we have given above, Christy states that he considered the contract "forfeited" from the date of his previous letter, and still so considered it. If his act in selling the land to other parties was evidence enough of a rescission, certainly his admission in his letter of February 9, 1889, makes that fact evident. It is also to be observed that the contract between the parties does not contain any provision which can possibly be construed as indicating that the twenty-five hundred dollars to be paid by Arnold was to be held as a forfeit by Christy in case of default of the former. Forfeitures are not favored in law, and in the absence of an express agreement none will be enforced. The rule, as laid down by Sutherland in his work on Damages (vol. 2, p. 232) is, that "on principle, if a contract is rescinded by the vendor, even for the vendee's default, the vendor should restore what he has received upon it; and this view is believed to be sustained by the weight of authority. Even if the contract shows that the parties intended that, on default of the vendee, all previous payments should be forfeited, and the contract declared void at the vendor's option, this intention should be disregarded for the same reasons that govern in other cases of penalties." We need not in this case go to the extent of holding with the learned author that, notwithstanding an express agreement, previous payments may

not be forfeited upon the default of the vendee and the rescission of the contract by the vendor, inasmuch as the contract between the parties hereto contains no such agreement. We need only hold that the effect of the rescission of the contract by Christy, even if Arnold was in default, was to render the former liable for the return of the twenty-five hundred dollars received by him from the latter. *Shively v. Water Co.*, 33 Pac. 848; *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280.

Assuming that Arnold was in default, unquestionably Christy had the right to be made whole for any damage sustained from such default. Without, however, some pleading on the part of the defendant alleging such damage, he could not be allowed any as a set-off in the suit to recover back the money paid under the contract. He could have recouped such damage, if any there was. The answer of the defendant averring that the receipt of the twenty-five hundred dollars had profited him nothing was not such a pleading as entitled him to prove and be allowed such damage as a set-off to plaintiff's demand. Paragraph 736 of the Revised Statutes provides that "whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill, or otherwise, the defendant shall be permitted to plead therein any counterclaim which he may have against the plaintiff, subject to such limitation as may be prescribed by law." Paragraph 737 provides that "the plea setting up such counterclaim shall distinctly state the nature and several items thereof and shall conform to the ordinary rules of pleading." Paragraph 742 provides that "in every action in which the defendant shall desire to prove any payment and counterclaim or set-off, he shall file with his plea an account stating distinctly the nature of such payment and counterclaim or set-off and the several items thereof; and on failure to do so he shall not be entitled to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof." If the reading of the above paragraphs does not make it clear that the term "counterclaim" embraces recoupment, Bliss (Code Pleading, sec. 370) is decisive on that point. The defendant should under the statute have set up his counterclaim based on such damage, and stated therein distinctly the nature of the damage sustained, so that the

plaintiff could have had "full notice of the character thereof." It is not clear from the evidence that Christy suffered damages from Arnold's default, if the latter was in default; but had it appeared that he had suffered such damages, he could not under the pleadings as they stand have been allowed them in this action. We see no error in the judgment, and it is therefore affirmed.

Hawkins, J., concurs.

ROUSE, J.—I do not concur in the opinion in this case.

[Civil No. 380. Filed March 8, 1894.]

[36 Pac. 895.]

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Defendant and Appellant, v. EDWARD ARHELGER, Administrator of the Estate of Alexander Graydon, Deceased, Plaintiff and Appellee.

1. **ATTORNEY AND CLIENT—STIPULATION AS TO EVIDENCE—AUTHORITY.**—It is competent for an attorney of the administrator of the estate of a deceased policy-holder to stipulate as to the truth of facts showing that certain answers made by deceased to questions propounded in the application for such policy and warranted to be true were in fact false.
2. **LIFE INSURANCE—PHYSICIAN DEFINED.**—To be one's physician means to attend upon him or to consult with him in a professional capacity about one's state of health.
3. **SAME—POLICY—ANSWER — WARRANTIES — FALSITY AVOIDS POLICY.**—Statements made by deceased in answer to questions contained in his application for a policy of life insurance wherein he represented that he had not consulted any physician for sickness since childhood, and did not remember the name or address of any physician attending him, by him "warranted to be true," and "offered to the company as a consideration of the contract," under the stipulation of the parties and the evidence in the case, shown to be false, constitute a breach of deceased's warranty and avoid the policy.
4. **SAME—SAME—DEFENSE—BREACH OF WARRANTY OF TRUTH OF ANSWERS—KNOWLEDGE OF APPLICANT OF FALSITY IMMATERIAL.**—It is a good defense to an action on a policy of life insurance to show

that answers made a part of the policy and warranted by the applicant to be true were in fact untrue, without showing that the applicant knew or believed them to be untrue.

5. SAME—SAME—SAME—PROOF OF KNOWLEDGE OF FALSITY NECESSARY WHEN ANSWERS ARE REPRESENTATIONS—*MOULOR v. INSURANCE CO.*, 111 U. S. 335, 4 SUP. CT. REP. 466, DISTINGUISHED.—When the words used in a contract of insurance are plain and constitute a strict warranty of the truth of the answers to questions therein contained, the rule in *Moulor v. Insurance Co.*, *supra*, that there was doubt of the meaning of the contract, and that it was therefore proper to consider the statements of the applicant as “representations” and warranties only to the extent that they were made in good faith and were true as far as the insured knew, is inapplicable.

ROUSE, J., dissenting.

6. CONTRACTS—CONSTRUCTION—RULE OF CONFINED TO CASES OF DOUBT.—The term “rule of construction” is confined by general usage to rules for the interpretation of written documents in matter on which, in the absence of a rule to aid, there might be a doubt.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Joseph H. Kibbey, Judge. Reversed.

The facts are stated in the opinion.

J. B. Early, for Appellant.

The general principles which govern warranty, representation, and concealment are the same in life as in fire and marine insurance, and a direct assertion of a material fact is understood to be a warranty of that fact, and perfect good faith is required of both parties. So, if the applicant warrants his answers to be true, and they are found to be untrue, although they may not be material to the risk, yet as he warranted the same to be true, and they are found to be untrue, it will avoid the policy.

It is the duty of the insured to disclose all material facts within his knowledge in regard to his health, and the concealment of a material fact when a general question is put by the insurers at the time of effecting the policy which would elicit that fact, will vitiate the policy. *Vose v. Eagle Life Ins. Co.*, 6 Cush. 42; *Campbell v. New England etc. Ins. Co.*, 98 Mass. 381; *Miles v. Connecticut etc. Ins. Co.*, 3 Gray, 580.

When a party enters into a contract for life insurance, and stipulates that his answers to questions propounded in the application are true, it matters not whether the statement appears to be material or not. The parties to the contract having determined that question for themselves, the court will not inquire into the materiality of the matter, but consider the same to be a warranty, and if any of the answers are found to be untrue it will avoid the policy. *Campbell v. New England etc. Ins. Co.*, 98 Mass. 381; *Miller v. Insurance Co.*, 31 Iowa, 216, 7 Am. Rep. 122, note.

A warranty in a policy of insurance is in the nature of a condition precedent, and constitutes a part of the contract, and it is necessary that it be exactly and literally complied with; and the application and the policy should be taken as one instrument and form one entire contract, and if the answers to any of the questions propounded to the insured should be found in any respect untrue, the policy shall be avoided. *Miller v. Insurance Co.*, 31 Iowa, 216, 7 Am. Rep. 122, note; *Campbell v. New England etc. Ins. Co.*, 98 Mass. 381; *Insurance Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8; *Kelsey v. Insurance Co.*, 35 Conn. 225; *Andrew Sceales v. Scandlan*, 6 Irish Law Rep. 367; *Daniels v. Insurance Co.*, 12 Cush. 416; 59 Am. Dec. 192; *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362; May on Insurance, pp. 179, 180.

Whether the fact stated or the act stipulated for be material to the risk or not, is of no consequence, the contract being that the matter is as represented. It shall be as promised, and unless it proves so, the insured can have no claim. *Cooper v. Insurance Co.*, 50 Pa. St. 331; *Insurance Co. v. McMaran*, 3 Dow. P. C. 225; *Sayles v. Northwestern Ins. Co.*, 2 Curt. 612, (Mass.) Fed. Cas. No. 12,422; *Anderson v. Fitzgerald*, 24 Eng. L. & E. 1, 4 H. of L. 484; *Witherell v. Insurance Co.*, 49 Me. 200; *Westfall v. Insurance Co.*, 2 Denio, 78; *Stout v. Insurance Co.*, 12 Iowa, 371, 79 Am. Dec. 539; *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72; *Patch v. Insurance Co.*, 44 Vt. 481; *O'Neil v. Buffalo Ins. Co.*, 3 N. Y. 122; *Swick v. Ins. Co.*, 2 Dill. 160, Fed. Cas. No. 13,692; *Appleton Iron Co. v. Insurance Co.*, 46 Wis. 23.

Nor does it matter that the insured was ignorant of having the disease inquired about. *Powers v. Northeastern Life Assn.*, 50 Vt. 630; *Continental Life Ins. Co., v. Young*, 113 Ind. 159;

3 Am. St. Rep. 630, 15 N. E. 220; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466; *Insurance Co. v. Gridley*, 100 U. S. 614; *Swartzbach v. Ohio Vol. Prot. Union*, 25 W. Va. 622, 52 Am. Rep. 227; *Gridley v. Insurance Co.*, 14 Blatch. 107, Fed. Cas. No. 5808; *Peasely v. Insurance Co.*, 15 Hun, 227; *Insurance Co. v. Heinman*, 93 Ind. 24; *Murphy v. Insurance Co.*, 6 La. Ann. 318, 26 Am. Dec. 478; *Home Mut. Life Ins. Co. v. Gillespie*, 110 Pa. St. 84, 1 Atl. 340.

Where the applicant untruly states that he has had no medical attendance or prescription, it avoids the policy. *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766; *Insurance Co. v. Great W. R. Co.*, 38 Law. J. 132.

An attorney has implied authority to make a stipulation as to the admission of evidence. *Erwin v. English*, 57 Conn. 362, 19 Atl. 238; *Van Horn v. Burlington R. R. Co.*, 69 Iowa, 239, 28 N. W. 547.

E. J. Edwards, for Appellee.

Graydon did not deny drinking spirituous liquors to some extent, and even if he had it would be wholly immaterial. An occasional indulgence to excess in strong drink would not render the answer false or untrue. *Insurance Co. v. Reif*, 36 Ohio St. 596, 38 Am. Rep. 613; *Insurance Co. v. Foley*, 105 U. S. 350; *Insurance Co. v. France*, 91 U. S. 510.

It is contended by appellant that Graydon in his application for insurance warranted his answers to be true, and that if any one of them is found to be untrue a recovery cannot be had. Contrary to such contention are the following cases: *Insurance Co. v. Gridley*, 100 U. S. 614; *National Bank v. Insurance Co.*, 95 U. S. 673; *Moulor v. Insurance Co.*, 101 U. S. 708; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466; *Insurance Co. v. Shultz*, 73 Ill. 586.

The case at bar cannot be distinguished from that of *Moulor v. Insurance Co.*, *supra*.

BAKER, C. J.—This suit was commenced by Edward Arhelger, administrator of the estate of Alexander Graydon, deceased, against the Mutual Life Insurance Company of New York upon a life policy issued by the appellant to the appellee's intestate. The case was tried before a jury, and a verdict

rendered in favor of the appellee in the sum of \$5,462.21. Judgment followed the verdict. The court denied a motion for a new trial, and the appeal is taken from the judgment and the order denying the new trial. The policy was issued to the deceased, Graydon, December 16, 1890, for the sum of five thousand dollars, and is what is commonly called a "fifteen-year distribution policy." Graydon was forty-five years of age at the time, and died February 28, 1891. Several defenses were interposed at the trial, but we shall consider only one,—viz., that there was a breach of warranty in the application for the insurance, wherein the deceased represented that he had not consulted any physician for sickness since childhood, and did not remember the name or address of any physician attending him. If we are right in our determination concerning this defense, none others need be discussed. The following questions and answers were asked of and made by Graydon in his application for the policy: "Question 17. When did you last consult a physician, and for what disease?—Answer. Not since childhood.—Question 18. Give names and addresses of the physicians who have attended you.—Answer. Don't remember." The truth of these answers was warranted in the same application for the policy as follows: "I also agree that all the foregoing statements and answers, as well as those that I make to the company's medical examiner in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract" (policy), etc. The following written stipulation, signed by the attorneys for the respective parties, is a part of the record, and was read in evidence to the jury at the trial: "The plaintiff admits that the following facts are true: That Dr. H. H. Huff was called to see the said Alexander Graydon, deceased, on the day of his death, and administered to said Graydon's wants as a physician; that Dr. H. H. Huff found said Graydon in a drinking condition; that Graydon said that he (Graydon) had been drinking, and was afraid to go to sleep, and wanted Huff to give him an opiate to make him sleep; that Dr. Huff had treated Graydon before, and then gave Graydon the opiate; that Graydon remarked to Huff that he (Graydon) preferred the opiate, as the other treatment made him sick; that Huff had been Graydon's physician from July, 1890, up to the date of Graydon's

death." The court also submitted the following special inquiries to the jury, and they returned the following answers: "Question 6. Did Graydon receive medical attention or have a physician within two years prior to December 15, 1890? If so, for what disease, if any?" In answer to the sixth interrogatory the jury say: "Yes; for cold and inflammation of the bowels." "Question 8. If any physician attended Graydon, did he know the name or names of the physician or physicians who attended him within two years prior to December 15, 1890?" In answer to the eighth interrogatory the jury say: "Yes." "Question 9. If any physician attended Graydon, did he know the address or addresses of the physician or physicians who attended him within two years prior to December 15, 1890?" In answer to the ninth interrogatory the jury say: "Yes." The stipulation must be construed as establishing the falsity of the applicant's answer to the question about consulting a physician for sickness. To be one's physician means to attend upon him or to consult with him in a professional capacity about his state of health; that is to say, to prescribe treatment, if necessary, and give directions and advice calculated to relieve from sickness and restore to health. The questions put to the applicant were comprehensive enough and clear enough to fully advise him of the fact the company desired to ascertain,—if he had consulted, or had been attended by, any physician for any sickness, and, if so, the name and address of such physician, and the character of such ailment. If he had consulted any physician in a professional character, or received any treatment or advice at the hands of one, it was his bounden duty to disclose the fact in answer to the inquiries, for his warranty fully covers such matters. The stipulation was a competent one for the attorney of the appellee to make, and, so far as the evidence is concerned, was justified; and, in our opinion, it clearly shows a breach of the warranty of the truth of the answers quoted. If there is any doubt of this, we add that the uncontradicted evidence unquestionably shows that the deceased was attended and treated by another physician, Dr. Cook, upon other occasions during the year 1888 or 1889, when he had indulged in protracted sprees and become sick.

The appellant had a perfect right to make the questions and answers in the application a part of the contract, and we

have no right to make any other or different contract for the parties. Such answers were material to the policy. They were made so by its terms, and no rule of construction will be suffered to destroy the effect of plain language. We hold that the statements by the deceased in the application for the insurance about a physician were warranted to be true, and that the stipulation and the evidence show a clear breach of such warranty. The policy is voided. *Dwight v. Insurance Co.*, 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; *McCollum v. Insurance Co.*, 28 N. Y. St. Rep. 272, 26 N. Y. Supp. 249; *Boland v. Association*, 74 Hun, 385, 26 N. Y. Supp. 433. It makes no difference whether the deceased knew them to be untrue or not. It is a good defense to show that as a matter of fact they were untrue, without showing that he knew or believed them to be untrue. *Society v. Llewellyn*, 58 Fed. 940, 7 C. C. A. 579.

Counsel for appellee directs our attention to the case of *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466, and thinks that case should govern this. The cases are clearly distinguishable. *Society v. Llewellyn*, *supra*. In *Moulor v. Insurance Co.* it was held, in effect, that there was doubt of the meaning of the contract, and it was therefore proper to consider the statements of the applicant as "representations" and warranties only to the extent that they were made in good faith, and were true, as far as the insured knew. The statements of the applicant were referred to in the body of the policy as being representations, and this expression was made to govern. But there is no doubt of the meaning of this contract. Read it as you will, it remains a strict warranty. The words used are plain, and are comprehended as soon as read. In such a case there is no room for construction, for the very good reason that there is no need of it. 2 Parsons on Contracts, 500. The term "rule of construction" is confined by general usage to rules for the interpretation of written documents in matters on which, in the absence of a rule to aid, there might be a doubt. Pollock on Contracts, 456. The judgment is reversed, and the case remanded for a new trial.

Sloan, J., concurs.

HAWKINS, J.—I concur in the reversal of the case.

ROUSE, J.—I concur in the reversal of the case, but not in the opinion. *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466, is not distinguishable from this case.

[Civil No. 366. Filed March 8, 1894.]

[36 Pac. 896.]

F. E. JORDAN et al., Plaintiffs and Appellants, v. JOHN DUKE et al., Defendants and Appellees.

1. EVIDENCE—IRRELEVANT AND IMMATERIAL—PREJUDICIAL.—The admission of evidence irrelevant and immaterial to the issues, and sufficient to prejudice the jury against the appellants, requires a reversal of the judgment.
2. JURY — INSTRUCTIONS — SUBMITTING QUESTION OF LAW TO JURY — MINES AND MINING.—An instruction containing the expression that if the mining ground was "not in the actual possession of one entitled thereto" at the time appellants located the same, then they were entitled to recover, submits a question of law to the jury, and is error.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Edmund W. Wells, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Hawkins, for Appellants.

The witness Henry C. Ashton, who testified for the defendants, detailed a conversation he claimed to have had with plaintiffs' witness Kell during the trial of this cause; the substance of this pretended conversation was, that Kell was a friend of the Verde people (meaning the owners of the United Verde Copper Company), and that he was going to do what he could to help them win the case. It will be observed that Kell had already been examined in regard to this matter while he was upon the stand. From an inspection of the testimony of this man Ashton and his pal, Dan O'Boyle, it will be seen that they were a pair of worthless, drunken loafers. Ashton denied having any interest in the matter, while

O'Boyle came out clear and said that he had not been promised anything, but that he was going to get some all the same, and they could not keep him out of it. The plaintiffs moved to strike out this testimony, because no proper foundation had been laid for its introduction. The Verde people were not parties to this suit, nor was Kell. The pretended contradiction was upon a matter wholly immaterial. The rule of law goes no further than to permit Kell to be interrogated upon these matters; when this is done defendants are not allowed to bring in witnesses to contradict, the rule being, that on immaterial matters the answer of the witness first examined is final and binding on defendants. Greenleaf on Evidence, pars. 449, 462; Rice on Evidence, p. 588f; *People v. Bell*, 53 Cal. 119; *People v. McKellar*, 53 Cal. 65; *Harper v. Illinois etc. R. R. Co.*, 47 Mo. 581.

The first instruction asked by the plaintiffs was to the effect that if from the evidence the jury found that on January 1, 1884, the ground in controversy was open, and that F. E. Jordan and his co-locators entered thereon and located the same by performing the acts necessary under the mining laws, reciting those facts, and since had done and performed the annual work, then the verdict should be for the plaintiffs. The court refused to give this instruction as asked, but modified it by adding "or was not in the actual possession of one entitled thereto," in the third line of the instruction, and gave the instruction so modified. The plaintiffs assign this as error. This modification raises purely a question of law. "In the actual possession of one entitled thereto." How could one be "entitled" to actual possession without complying with the mining laws and regulations? And would actual possession be of any avail against an actual locator? *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Belk v. Meagher*, 104 U. S. 284; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280.

Baldwin & Johnston, for Appellees.

ROUSE, J.—Appellees filed in the land office at Prescott, Arizona, in May, 1891, an application for a patent to a certain mining claim in Verde Mining District, Yavapai County, Arizona, called the "Copper Chief." In July thereafter, appellants filed in said land office their contest to said appli-

cation for a patent to said mining claim, on the ground that 6.14 acres of the land embraced in said mining claim was the property of the appellants, and within the limits of a certain mining claim belonging to them, called the "Equator." Upon the filing of said contest an order was duly made in said land office, by the proper officers thereof, staying all further proceedings in the matter of said application for a patent until the rights of the parties to that portion of said mining claim could be ascertained and determined by a court of competent jurisdiction. Appellants thereafter instituted this suit against appellees, claiming the title and right of possession of 6.14 acres of land embraced within the said mining claim, Copper Chief, fully describing said 6.14 acres, as a part of a certain mining claim of the name of "Equator," claimed by appellants. It appears from the record that on January 1, 1884, the appellants F. E. Jordan, E. A. Jordan, and W. A. Jordan located the mining claim Equator; that the 6.14 acres of land in dispute is within the exterior limits of said mining claim; that said parties performed all the necessary work and acts to entitle them to the possession of said Equator mining claim from the date of the location thereof until March, 1888, when they conveyed an undivided interest in said mining claim to the appellant W. S. Head; that the appellants, from the date of said conveyance to Head, have had possession of said mining claim, and performed all the acts and things necessary and proper to be done to hold said mining claim, up to the date when this suit was instituted; that the 6.14 acres in controversy, embraced within both of said mining claims,—viz., Copper Chief and Equator,—is ground formerly embraced within a certain mining claim called the Nellie, which was located in January, 1882; that the Copper Chief mining claim was located in October, 1883, by the appellee W. H. Ferguson. If the Nellie was a valid location, the ground embraced therein was not open for relocation until January 1, 1884, and the location of the Copper Chief in October, 1883, was void as to all parts thereof embraced in the Nellie. The 6.14 acres of land in dispute are embraced within what was the Nellie mining claim, and also within the Equator and Copper Chief; and if appellants' mining claim, the Equator, is a valid mining claim they should have judgment therefor. The complaint contained substantially the foregoing facts, and, in

addition thereto, facts that showed the Nellie to be a valid mining claim, and that the Equator was a valid mining claim.

These facts having been established on the trial, and the judgment being for the defendants, we are forced to examine the record, to see if any errors were committed upon the trial that would make it necessary to reverse the judgment. An examination of the record discloses the fact that, on the trial, defendants were permitted to contradict witnesses for plaintiffs on matters irrelevant and immaterial; to prove that a witness for plaintiffs was very friendly to a certain large mining company, which was not a party to the suit; to show that certain witnesses for the plaintiffs had located the same ground in controversy in 1883, and to put the location notice of said claim in evidence. Errors of the character above enumerated are too numerous in the record to be mentioned individually. They were sufficient to prejudice the jury against the plaintiffs, and to require a reversal of the judgment. 1 Greenleaf on Evidence, 11th ed., pars. 449-462; 1 Rice on Evidence, p. 588f; *People v. Bell*, 53 Cal. 119; *Harper v. Railroad Co.*, 47 Mo. 567, 4 Am. Rep. 353.

The only other error assigned that we will notice relates to the instructions given and refused. Plaintiff offered the following instruction, viz.: "No. 1. If the jury believe from the evidence that on the first day of January, 1884, the ground in controversy was not embraced within the boundaries of any valid location, *or not in the actual possession of one entitled thereto*, and that on said day, F. E. Jordan, for himself and his co-locators, entered upon the same, and located the same in the Equator location, marking the boundaries of said Equator lode by placing stone monuments at the point of discovery, and also at each end and each corner thereof, so that the boundaries thereof could be readily traced on the ground, and placed a notice thereon containing the names of the locators, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument, as would identify the claim, and within sixty days thereafter caused said notice to be recorded in the recorder's office of said county of Yavapai, where said claim is situate, and since that time plaintiffs have done, or caused to be done, and performed, at least \$100 worth of labor or improvements thereon during each year, then your verdict

should be for the plaintiffs.” Plaintiffs presented said instruction to the court, and asked that it be given without the part in italics. The court modified it by inserting the part in italics, and, as thus modified, gave it, to which plaintiffs excepted. It is shown by the record that there was evidence before the jury that one of the defendants located the Copper Chief in October, 1883. Hence, there was evidence from which the jury might have found that, at the time plaintiff F. E. Jordan located the Equator, the ground embraced in the Equator was in the actual possession of another. They were instructed that, if they should so find, only one other thing was necessary for them to determine in order that their verdict should be for defendants, and that was, that the one in possession was entitled thereto. A mining claim is acquired by the performance of certain specific acts, and there can be no possession of such a claim unless the party has performed those acts. The acts referred to, when performed, constitute a location. It requires a location of a mining claim to give the right of possession. Hence, it is apparent that by the modification of said instruction a question of law was submitted to the jury. *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Belk v. Meagher*, 104 U. S. 284; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280.

Other instructions were given that are subject to similar criticisms as the one given, but it is not necessary that we should single them out and point out the errors contained in them. For the errors mentioned the judgment must be reversed and the cause remanded for a new trial, and it is so ordered.

BAKER, C. J.—I agree that the judgment of the lower court ought to be reversed.

Sloan, J., concurs in the judgment.

Hawkins, J., did not take part in this case.

[Civil No. 409. Filed March 8, 1894.]

[36 Pac. 916.]

GEORGE FIFIELD, Plaintiff and Appellant, v. THE COMMON COUNCIL OF THE CITY OF PHOENIX, Defendant and Appellee.

1. MUNICIPAL CORPORATIONS—PERSONAL INJURIES—ACTION FOR DAMAGES ARISING FROM TORTS OF OFFICERS OR CONDITIONS OF STREETS, SIDEWALKS, ETC.—INHIBITED BY CHARTER OF PHOENIX, ART. 18, SEC. 7.—The charter, *supra*, inhibits an action against the city of Phoenix for damages for personal injuries arising from the granting of permission by the mayor and marshal to discharge fireworks within the city limits.
2. SAME—SAME—ORDINANCE—SUSPENSION—ACTION AGAINST CITY FOR DAMAGES FOR INJURIES RESULTING FROM DISCHARGE OF FIREWORKS DURING SUSPENSION OF ORDINANCE AGAINST.—The suspension of an ordinance against the discharge of fireworks within certain limits in a city does not render the city liable in an action for damages for personal injuries resulting from the discharge of fireworks within such limits during the time of its suspension.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

Kibbey & Israel, for Appellant.

This case is distinguishable from that large class of cases wherein municipal corporations are held liable for mere negligence. In this case the city authorized the discharge of the fireworks, and therefore became a participant in an unlawful proceeding, and became, as it were, a partner in maintaining a nuisance.

When a municipal corporation charged with the care and maintenance of its streets goes so far as not only to negligently omit to make them reasonably safe, but to expressly authorize the creation of a nuisance in them, from which injury proximately results, it, we submit, should be held liable. *Cohen v. City of New York*, 113 N. Y. 532, 10 Am. St. Rep. 506, 21 N. E. 700.

The case of *Speir v. City of Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, 34 N. E. 727, is on all fours with the case at bar, and the court there held in an exhaustive opinion that the city should be held liable.

L. H. Chalmers, for Appellee.

In cases like this the charter of the city of Phoenix expressly provides that there shall be no liability. Sec. 7, art. 18, Charter of the City of Phoenix, passed by the thirteenth legislative assembly of the territory of Arizona, March 11, 1885.

But even if no such exemption existed, the weight of authority is overwhelming that no liability exists under the circumstances of this case. Cooley on Municipal Corporations, sec. 949; Cooley on Torts, p. 620; *Wheeler v. City of Plymouth*, 116 Ind. 158, 18 N. E. 532; *Lincoln v. City of Boston*, 148 Mass. 578, 12 Am. St. Rep. 601, 20 N. E. 329; *Tindley v. City of Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Hill v. Board of Aldermen*, 72 N. C. 55, 21 Am. Rep. 451; *Rivers v. City Council of Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332.

A municipal corporation is an instrumentality of government, and is not liable for the failure to exercise legislative or judicial powers, nor for an improper or negligent exercise of such powers. *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Dooley v. Town of Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 13 N. E. 566; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Faulkner v. City*, 85 Ind. 130; *City v. Timberlake*, 88 Ind. 330; *McDade v. Chester City*, 117 Pa. St. 414, 2 Am. St. Rep. 681, 12 Atl. 421; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383, 21 N. W. 873; *Hines v. Charlotte*, 72 Mich. 278, 40 N. W. 333; *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443; *Hubble v. City of Viroqua*, 67 Wis. 343, 30 N. W. 847.

Giving the case of *Speir v. Brooklyn* all the appellant claims for it, it stands alone in American and English jurisprudence.

HAWKINS, J.—This was an action by appellant to recover damages for personal injuries sustained by him. He based his claim for relief upon the facts that the appellee is

a municipal corporation created by an act of the legislative assembly of the territory, approved February 25, 1881, and an act of March 11, 1885, amendatory thereof; that the corporation, in 1889, ordained, among other things, that it should be unlawful for any person within certain city limits, to make any bonfire, discharge any firecrackers, skyrockets, or any fireworks whatever, etc., without first having obtained permission therefor from the city marshal (this ordinance was in effect at the time of appellant's injuries); that on the fifteenth day of February, 1893, the city, by and through its members, its mayor, and its marshal, unlawfully and negligently granted to certain Chinese permission to set off, discharge, and explode fireworks upon certain streets of said city, within the fire limits; that appellant, a hackdriver, on that day, while in the proper pursuit of his business, was driving along the streets of said city; that while so driving along a street within said fire limits, the Chinese, acting under the permit so granted them, fired off and exploded a large quantity of fireworks, firecrackers, and bombs, whereupon appellant's horses (they being gentle and well broken) became frightened and unmanageable, and threw appellant to the ground, all without fault upon his part, and he was thereby very seriously injured, sustaining a very serious fracture of the leg, and otherwise bruised. The court below sustained a general demurrer to the complaint on this state of facts, and appellant asks that the ruling be reversed.

Section 7 of article 18 of the charter of the city of Phoenix provides as follows: "Sec. 7. That said corporation shall not be liable to any one, or for any loss or injury to person or property growing out of or caused by the malfeasance, misfeasance, or neglect of duty of any officer or other authorities of said city or for any injury or damages happening to such person or property on account of the condition of any zanja, sewer, cesspool, street, sidewalk, or public ground therein, but this does not exonerate any officer of said city or any other person from such liability when such casualty or accident is caused by willful neglect of duty enforced upon such officer or person by law or by gross negligence or willful misconduct of any such officer or person in any other respect." It seems to us that any fair construction of this section inhibits such form of action against the city. Appellant in his

reply brief disclaims any negligence on the part of the city marshal in granting the permit, but says it became the negligent act of the city itself, and such city was an agency in the committing of the injury. We are unable to agree to this line of argument. It could not do more than to undertake the evasion of the plain letter of the city charter. Under this charter, if the city officer performs an act which is authorized by an ordinance, it would not, on his part, be negligence. Then how could it become negligence on the part of the city itself?

Plymouth, Indiana, had an ordinance prohibiting the firing of gunpowder or any other substance, except on occasions of public rejoicing, when the mayor granted permission to fire guns, cannons, and other things in which gunpowder was used. On the 4th of July, 1885, the mayor granted permission to fire gunpowder in an anvil on a lot in said city; and when it was fired it blew gravel and stones against one of Wheeler's plate-glass windows and broke them. The supreme court of Indiana, in *Wheeler v. City of Plymouth*, 116 Ind. 158, 18 N. E. 532, in passing upon the question of the liability of the city says: "A city which has an ordinance prohibiting the firing of gunpowder, but allowing the mayor to license such firing on certain occasions, is not liable for the damages occasioned by the negligence of the licensees, there being nothing to show that the authorized act was necessarily dangerous." It is also decided in the same case that "there is no actionable breach of corporate duty in failing to enact a proper ordinance, or in failing to enforce one that has been enacted; and consequently this action cannot be maintained upon the theory that there was a proper ordinance, nor upon the theory that the ordinance was not enforced." Under this theory it seems clear that the action at bar could not be maintained if the ordinance was not enforced. Then, upon what system of reasoning could it be maintained because it was suspended for a day? For failing in governmental action, municipal corporations are responsible only to their corporators or the power creating them. Cooley on Torts, 620. It shows no ground of action when one complains that he has suffered damages because the operation of an ordinance which prevents the explosion of fireworks within the city has been temporarily suspended. Cooley on Torts, 626.

Lincoln v. City of Boston, 148 Mass. 578, 12 Am. St. Rep. 601, 20 N. E. 329, was also a case where the mayor permitted the firing of cannon upon the commons under an ordinance forbidding it unless such permission was given, and the plaintiff's horse took fright and ran away on a neighboring street. This license to fire cannon was held to be an act of municipal government, and the person doing the firing was not the city's agent so as to make the city liable.

The firing of the Chinese bombs, in the case at bar, was not the act of the city, nor did the city have any agency in said act. A licensee does not thereby become the agent of a municipal corporation. *Lincoln v. City of Boston, supra*; *Fowle v. Alexandria*, 3 Pet. 398. Chief Justice Marshall, in *Fowle v. Alexandria*, says: "That corporations are bound by their contracts is admitted. That money corporations, or those carrying on business for themselves, are liable for torts, is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance—by an omission of the corporate body to observe a law of its own, in which no penalty is provided—is a principle for which we can find no precedent."

Rivers v. Common Council, 65 Ga. 376, 38 Am. Rep. 787, is a well-considered case, and is very similar to the case at bar. The plaintiff, a minor child, while walking upon one of the defendant's streets, was seriously gored by a cow which was running at large in the streets of said city. She sued the corporation for damages alleged to be sustained by reason of this misfortune. It will be noticed, by reference to the facts in this case, that the allegations of the declaration are quite similar to the complaint in the case before us. In 1878 the city had an ordinance against cattle running at large. This ordinance was suspended at the time of the injury to the child. Mr. Justice Crawford says: "The adoption of an ordinance in reference to allowing cattle to run at large in the city is one which is wholly legislative and therefore discretionary. It is not liable in damages for neglecting, omitting, or refusing to notice the subject, or having noticed it, and adopted an ordinance concerning it, then to repeal or suspend it." The same reasoning would undoubtedly apply to an ordinance against the firing of bombs, etc. In the Georgia case it was argued that, so long as a city fails to legislate, it

is not liable, but when it does, then its liability for damages accrues. The court was unable to appreciate this difference, but cited the case of *Hill v. Board*, 72 N. C. 55, 21 Am. Rep. 451, as a case directly in point. An ordinance prohibiting the use of fireworks was passed, remained in force some years, was then suspended from the twenty-fifth day of December to January 1st, inclusive. During this time, by the firing off of squibs, firecrackers, and Roman candles, plaintiff's house was burned, for which he sued the city. *Held*, that it was within the discretion of the authorities to determine, from time to time, what ordinances were proper, and that the corporation was not liable. Also, see, *Tindley v. City of Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Hill v. Board*, 72 N. C. 55, 21 Am. Rep. 451. If the ordinance in question had been repealed on the day before the accident to appellant, it seems clear that there could be no liability against the city. Then, upon what system of reasoning could he recover simply because the ordinance was suspended on the day of the accident?

Appellant, in his brief, relies upon the cases of *Cohen v. Mayor etc.*, 113 N. Y. 532, 10 Am. St. Rep. 506, 21 N. E. 700; *Speir v. City of Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, 34 N. E. 727. In *Cohen v. Mayor etc.*, the facts were that the city, by a permit, allowed a grocer to keep a wagon in front of his store when not in use. On a certain morning Cohen was walking along the street in front of the grocer's store. At the same time a wagon loaded with ice was passing in one direction, and one loaded with coal was passing in the other. The grocer's wagon, without any horse attached, was standing in front of his store. The thills were tied up in a perpendicular position with a string. The length of the wagon was parallel with the course of the street. The ice-wagon, probably in attempting to avoid the coal-wagon, caught against the wheel of the grocer's wagon, turned it around, and loosened the thills, so that they fell and struck Cohen on the head, injuring him so that he died the next day. The city was held liable. The court held that the permission was not authorized by law, and that the owner of the wagon acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a nuisance. The defendant was also guilty because it assumed to authorize the erection and continuance of a nuisance. The

legal power to obstruct the street by grant of a license had been withheld by the legislature from the city. Nevertheless, it did grant such a permit, and took a compensation on account of it. In thus doing, the city became a partner in the erection and continuance of such nuisance.

Speir v. City of Brooklyn, supra, was a case where fireworks were allowed by the mayor, under an ordinance, at the junction of two narrow streets in the city of Brooklyn, and plaintiff's property was destroyed, and the city was held liable; the court having held that the circumstances of that particular case made the same a public nuisance, and the plaintiff recovered under that theory. Such displays, the court seemed to think, should be under the supervision of the municipal authorities, and it was probably entirely proper for the court to rule as it did in this particular case. It was at the junction of two narrow streets of a large city, completely built upon, and where any misadventure in managing the discharge would be likely to result in injuries to persons or property. The action in the case at bar is not upon the theory that the city was guilty of unlawfully erecting and maintaining a nuisance. A city is liable for maintaining a nuisance, unless expressly authorized by law to do so. It was on this theory a recovery was had in the New York cases. It may have been an error of judgment in the officers of the city in granting the permit or suspending the ordinance on the particular street on the day alleged, but cities are not responsible for errors of judgment of their officers in the enforcing of their laws. We must conclude that, both from the reading of the charter of the city and the weight of authority, the chief justice was correct in sustaining the demurrer, and the judgment is affirmed.

Rouse, J., and Sloan, J., concur.

[Criminal No. 90. Filed March 8, 1894.]

[37 Pac. 368.]

TERRITORY OF ARIZONA, Plaintiff and Respondent, v.
H. B. TURNER, Defendant and Appellant.

1. CRIMINAL LAW—CONSPIRACY TO COMMIT MISDEMEANOR—REV. STATS. ARIZ. 1887, PEN. CODE, PARS. 266, 1654, CITED—AGREEMENT—OVERT ACT.—In a charge of conspiracy the corrupt agreement is usually the gravamen of the offense, but in a trial for conspiracy to commit a misdemeanor, under the statutes (pars. 266, 1654, *supra*), it is necessary to prove the corrupt agreement and one or more of the criminal acts charged before it becomes a conspiracy.
2. SAME—SAME—EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR—FOUNDATION.—Conspiracy should be first established *prima facie* before the acts and declarations of a co-conspirator can be admitted in evidence against another.
3. SAME—SAME—KILLING CATTLE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 973, AS AMENDED, LAWS 1889, P. 21—EVIDENCE—WHETHER DEFENDANT BUTCHER MATERIAL—STATUTE CREATING MISDEMEANOR STRICTLY CONSTRUED.—In a prosecution for conspiracy to commit a misdemeanor by killing cattle for sale, defendants being persons not engaged as butchers, and not retaining in their possession the hides for twenty-one days as required by statute, *supra*, the fact as to whether defendants were butchers is material, and must be proved. The overt act charged is a statutory misdemeanor, and such statutes are strictly construed.
4. SAME—SAME—EVIDENCE—PROOF OF OVERT ACT BY TWO PERSONS INSUFFICIENT.—Mere proof of the commission of a misdemeanor by two or more persons is insufficient to sustain a conviction for conspiracy to commit such misdemeanor.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Allen R. English, for Appellant.

The statement of facts shows that there was no evidence as to whether defendants were butchers, and the only way to show it in such a case is by the county records from the recorder's office; yet, in the absence of any evidence, the jury were told

that if they found from the evidence that the defendants were not butchers, etc. This was misleading, and did mislead the jury.

Again, they were charged "not being butchers." It was a material inquiry, and should have been proven; for if they were butchers, it was only necessary to retain them for five days. Pen. Code, par. 973, and Laws 1889, p. 21. It was necessary to allege a negative. It was equally necessary to prove it.

The statement of facts shows that before any conspiracy was attempted to be proved the court, over defendants' objections and exceptions, admitted the testimony of the prosecuting witness, a self-confessed and paid detective, looking for a reward, as to statements made by co-defendants in the absence of and without the hearing of this defendant. This was error. 4 Am. & Eng. Ency. of Law. 631.

Francis J. Heney, Attorney-General, for Respondent.

HAWKINS, J.—The appellant was indicted, with others, for conspiracy to commit a misdemeanor,—viz., they, being persons not engaged as butchers, did conspire, etc., to kill cattle for sale, and not retain in their possession the hides taken off said animals, with the earmarks attached thereto, without any alteration or disfiguration of the brands or marks on said hides, for twenty-one days, etc., free to the inspection of all persons (Pen. Code 1887, par. 973, as amended 1889, p. 21), and then charges several overt acts, substantially in the language of the said statute, of said parties, not being engaged as butchers in killing cattle, and not retaining the hides, etc. This statute makes the crime a misdemeanor, and the penalty for not so retaining the hides, etc., is a fine not exceeding two hundred dollars. Conspiracy is punishable by imprisonment in the territorial prison not exceeding one year, or by a fine not exceeding one thousand dollars. The statute regarding the crime of conspiracy provides that no agreement, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act besides such agreement be done to effect the object thereof by one or more of the parties to such agreement. Pen. Code, p. 701, par. 266. And upon a trial for conspiracy, in a case

where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved. Pen. Code, par. 1654. The appellant, in his motion for a new trial, alleges various grounds of error.

The main question for us to consider seems to be, Were there any facts showing a conspiracy? If not, the motion of appellant to direct a verdict of acquittal should have been granted. In a charge of conspiracy the corrupt agreement is usually the gravamen of the offense. Under the statute in this case it is necessary, however, to prove the corrupt agreement, and one or more of the criminal acts charged, and, after these are both charged and proved, it becomes conspiracy. After a full examination of the evidence, we are unable to find that any such agreement was proved either directly or by circumstances. It is true it was permitted, over the objection of the defendants, for the prosecution to prove a conversation between witness Taylor and Lyall regarding Mart Taylor selling witness an interest in the XL cattle, saying, by working together, and branding everything, they could soon make up a good herd. This was in the absence of the defendants, and no evidence had been introduced showing that a conspiracy had taken place, and could only prejudice the jury. It is said to be a rule of ancient standing that the conspiracy should be first established, *prima facie*, before the acts and declarations of a co-conspirator can be admitted in evidence against another. The most that can be said from the testimony in the case is, that the territory has tried to prove one or more of the overt acts alleged. This proof also falls short of what would be required if the defendants were being prosecuted for the misdemeanor alleged as the criminal act. There is no evidence as to whether defendants were butchers. This was a material matter, and would have to be proved. The overt act charged is a statutory misdemeanor. Such statutes are to be strictly construed. If the defendants were butchers, the law only required the hides to be kept five days.

The court also charged the jury, the defendants "not being butchers," etc. It was clearly material to prove this. The allegation in the indictment was no proof against the defendants. It was all there was before the jury on this point. But,

if one or more of the overt acts had been proved, that alone would not have been sufficient to convict the defendants. It is primarily necessary to prove the corrupt agreement, and then such overt act. It is made so by the law. It would be a dangerous thing to hold otherwise. If two persons together commit a misdemeanor, then all that would be necessary to do would be to indict them for a conspiracy, prove the commission of the misdemeanor, and convict them of a felony. It was the intention of the statute making conspiracy a felony to prevent just such a thing. All that can be said of the facts and circumstances in this case is, that they all tend solely towards connecting defendant with the commission of the misdemeanor charged, or some other crime. In *Loggins v. State*, 8 Tex. App. 434, it is held that "ordinarily the mere proof that two or more parties were actually engaged in the commission of a crime does not lead to the necessary inference that, days or weeks or months before its commission, they had mutually undertaken and agreed to its commission." And again, in the same decision, it is stated that "it would be a doctrine fraught with mischievous results if the mere proof of an actual commission of a criminal act by two or more parties was sufficient, in itself, to justify the conclusion that a conspiracy had been formed, a week or a month before, by the same parties, to commit the particular offense in question." We must therefore conclude that the court erred in not sustaining the motion to direct a verdict for defendant. The judgment is therefore reversed.

Baker, C. J., concurs.

[Civil No. 417. Filed March 8, 1894.]

[36 Pac. 175.]

HENRY DIAL, Plaintiff and Appellant, v. OSCAR OLSEN
et al., Defendants and Appellees.

1. JUSTICE OF PEACE—CHANGE OF VENUE—JURISDICTION—NECESSITY FOR FILING OF TRANSCRIPT—REV. STATS. ARIZ. 1887, PAR. 1408, 1409, CONSTRUED.—Where a change of venue is granted in a justice's court, and an order of transfer made, as is required by para-

- graph 1408, *supra*, the jurisdiction of the justice granting the order ceases, and the jurisdiction of the justice to whom the case is sent attaches by operation of law; but the latter cannot proceed to exercise the jurisdiction until the officially certified transcript of the docket entries in the case provided for by paragraph 1409, *supra*, is filed. A judgment rendered by the latter before the receipt of the transcript is a nullity.
2. SAME—MANDAMUS—TO COMPEL TRANSMISSION OF TRANSCRIPT REQUIRED BY REV. STATS. ARIZ. 1887, PAR. 1409.—*Mandamus* will lie to compel a justice to make out and transmit the transcript required by paragraph 1409, *supra*.
 3. SAME—SPECIAL APPEARANCE—DOES NOT WAIVE ERROR IN PROCEEDING WITHOUT TRANSCRIPT—ANSWER TO MERITS AFTER OBJECTION OVERRULED.—A defendant does not waive the illegality in a justice, to whom a case is transferred, proceeding to trial and judgment in the absence of a transcript of the proceedings in the former court, by appearing specially and objecting thereto, nor by answering and defending after his objection was overruled.
 4. INJUNCTION—RESTRAINING LEVY OF EXECUTION BASED ON VOID JUDGMENT.—Injunction will lie to restrain the levy of an execution upon a judgment rendered by a justice of the peace to whom a cause has been transferred prior to receipt by him of a transcript, required by paragraph 1409, *supra*, of proceedings in the court from which the case came.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Joseph H. Kibbey, Judge. Reversed.

The facts are stated in the opinion.

John W. Kobb, and Heney & Ford, for Appellant.

Cox & Street, and R. E. Wilson, for Appellees.

BAKER, C. J.—The appellant filed his complaint in the court below to restrain the levy of an execution upon his property, as well as the issuance of an *alias* execution under a judgment obtained in a justice of the peace court. We gather the following facts from the complaint: The appellee Olsen sued the appellant in the justice court of precinct No. 1, in Graham County, for damages. The defendant in that suit, being the appellant here, made an application for a change of venue to the justice court of precinct No. 12, which was granted. He also obtained a change of venue from the justice

court of precinct No. 12 to the justice court of precinct No. 10, and from there to the justice court of precinct No. 6, where this roving and travel-stained case was finally tried, and judgment rendered against the defendant. It is this judgment which is now claimed in this suit to be void. The following paragraphs of the Revised Statutes are applicable to a change of venue in justices' courts: "1408. The order of transfer in such cases shall state the cause of the transfer and the name of the court to which the transfer is made, and shall require the parties and witnesses to appear before such court named in the order, not less than two or more than five days after its date. 1409. When such order of transfer is made it shall be the duty of the justice who made the order immediately to make out a true and correct transcript of all the entries made on his docket in the cause and certify thereto officially, and to transmit the same, with a certified copy of the bill of costs taken from his docket and the original papers in the cause, to the justice of the peace of the precinct to which the same has been transferred." The complaint shows that in each instance of a change of venue no transcript of the docket entries in the case was sent to the other justice, and that the defendant objected to the proceedings for that reason. These objections were overruled, but the defendant was granted another change of venue until the case was finally tried in precinct No. 6. When the case reached that court, and before pleading to the merits, the defendant appeared specially, and objected to the proceedings upon the ground that no transcript of the docket entries had been sent to the court. This objection was overruled, and the court proceeded to try the case without such transcript of docket entries, and rendered the judgment complained of in this suit. The appellee demurred to the complaint upon the ground that no cause of action was stated. The court sustained the demurrer, and, the appellant declining to amend his complaint, final judgment was rendered, and the appeal was taken.

Did the court err in sustaining the demurrer? We think so. The appellant cannot complain of the defects occurring before the several justices prior to the one in precinct No. 6, for the reason that in every instance where he objected to those defects, though the objection was overruled, the case was transferred subsequently upon his motion to another justice,

and no judgment was given against him in such courts. But the judgment rendered by the justice in precinct No. 6 is a nullity. When a justice makes the order required by paragraph 1408 of the Revised Statutes, his jurisdiction over the case ceases, and the jurisdiction of the justice to whom the case is sent attaches by operation of law; but the latter cannot proceed to exercise that jurisdiction until the officially certified transcript of the docket entries in the case provided for by paragraph 1409 is transmitted to him by the justice ordering the transfer. His jurisdiction lies dormant until it is vitalized by the filing of such transcript in his court. The parties are required to see that this record is sent to the justice to whom the case is transferred, and upon failure of the justice to comply with paragraph 1409 a *mandamus* will command him to do so. In the mean time the justice to whom the transfer is made cannot proceed, and no substantial right of either litigant can be affected. The appellant did not waive the illegality in the proceedings by appearing specially and objecting. Laws of Ariz. 1893, p. 61. The fact that he answered and defended after his objection was overruled did not cure the illegality; that could only be waived by answering to the merits in the first instance. We are satisfied that the remedy by injunction was the appropriate one in this case. Reversed.

Sloan, J., and Hawkins, J., concur.

MEMORANDUM DECISIONS.

[Criminal No. 398.]

A. A. BEASON, Appellant, v. **TERRITORY OF ARIZONA**,
Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge.

F. L. B. Goodwin, and **E. J. Edwards**, for Appellant.

F. J. Heney, Attorney-General, and **Wiley E. Jones**, District Attorney, for Respondent.

January 10, 1894. Affirmed.

[Civil No. 369.]

UNITED STATES OF AMERICA, Appellant, v. **SAMUEL H. DRACHMAN**, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge.

O. T. Rouse, U. S. District Attorney, for Appellant.

Selim M. Franklin, for Appellee.

January 10, 1894. Affirmed.

[Civil No. 400.]

CONCEPCION ALVARADO, Appellant, v. **ISAAC LEVY**,
Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Yuma. A. C. Baker, Judge.

G. M. Knight, and H. N. Alexander, for Appellant.

H. C. Davis, and S. M. Franklin, for Appellee.

January 11, 1894. Dismissed.

[Criminal No. 82.]

TERRITORY OF ARIZONA, Respondent, v. JOHN C.
HOWARD, Appellant.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

H. F. Andrews, for Appellant.

F. J. Heney, Attorney-General, and R. E. Morrison, District Attorney, for Respondent.

January 15, 1894. Dismissed on motion of Attorney-General, defendant having been pardoned by Governor.

[Civil No. 418.]

FRANK VOMOCIL, Appellant, v. C. V. MOOTE, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Yuma. A. C. Baker, Judge.

S. M. Franklin, for Appellee.

January 16, 1894. Dismissed.

[Civil No. 410.]

THE COUNTY OF PINAL, Plaintiff in Error, v. GEORGE
PUSH et al., Defendants in Error.

WRIT OF ERROR from the District Court of the Third Judicial District in and for the County of Maricopa. Joseph H. Kibbey, Judge.

Kibbey & Israel, for Plaintiff in Error.

S. M. Franklin, for Defendants in Error.

January 16, 1894. Affirmed.

[Civil No. 353½.]

THE DELINQUENT TAX-LIST OF THE COUNTY OF PIMA FOR THE YEAR 1891, Defendant and Appellant, v. THE TERRITORY OF ARIZONA, Plaintiff and Appellee. Appeal of DON A. SANFORD, Objector.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge. Affirmed.

Maxwell & Satterwhite, for Appellant.

Frank H. Hereford, and William H. Lovell, for Appellee.

BAKER, C. J. This is an appeal from a judgment for delinquent taxes for the year 1891. The questions presented relate mainly to the manner of making the assessment and making up the delinquent list. We do not think any of them fatal to the taxes, and deem them irregularities only. This case is governed by the one decided at the present term (*In re Delinquent Tax-List of Pima County, ante*, p. 186), and the case of *Atlantic and Pacific R. R. Co. v. Yavapai County*, 3 Ariz. 117, 21 Pac. 768. The judgment is affirmed.

Hawkins, J., concurs.

Rouse, J., concurs in result.

January 17, 1894.

[No. 392.]

THE PERSONS, REAL ESTATE AND PROPERTY DESCRIBED IN THE DELINQUENT LIST OF THE COUNTY OF PIMA FOR THE YEAR 1892, Maish & Driscoll, Objectors, v. THE TERRITORY OF ARIZONA, Appellee.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge.

C. W. Wright, for Objectors.

F. H. Hereford, and William H. Lovell, for Appellee.

January 17, 1894. Affirmed.

[Criminal No. 79.]

TERRITORY OF ARIZONA, Respondent, v. R. B. MAY,
Appellant.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. Edmund W. Wells, Judge.

Baldwin & Johnston, and Stewart & Doe, for Appellant.

Francis J. Heney, Attorney-General, for Respondent.

PER CURIAM.—By authority of *Hunter v. Territory, ante*, p. 197, (decided at this term,) in which the same question was raised as to the jurisdiction of this court, the motion of the attorney-general to dismiss the appeal herein is allowed.

Hawkins, J., not sitting.

January 23, 1894.

[Criminal No. 85.]

TERRITORY OF ARIZONA, Respondent, v. FRANK H.
HOWARD, Appellant.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge.

Charles Weston Wright, for Appellant.

Francis J. Heney, Attorney-General, for Respondent.

PER CURIAM.—By authority of *Hunter v. Territory, ante*, p. 197, and *May v. Territory, ante*, p. 300, (decided at this term,) on motion of the attorney-general, the appeal in this case is dismissed.

January 23, 1894.

[Civil No. 408.]

C. E. MCGINNESS, Appellant, v. A. D. MCGINNESS,
Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

Kibbey & Israel, for Appellant.

Fitch & Campbell, for Appellee.

January 23, 1894. Affirmed.

[Civil No. 404.]

F. A. KLEYENSTAUBER et al., Appellants, v. ISADORE
E. SOLOMON et al., Appellees.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge.

R. E. Wilson, for Appellants.

Edwards & Moorman, and W. E. Jones, for Appellees.

July 24, 1894. Dismissed.

[Civil No. 375.]

ARIZONA GAZETTE COMPANY, Petitioner, v. H. C.
BOONE, Auditor, Respondent.

ORIGINAL APPLICATION for Writ of Mandamus.

Cox & Street, for Petitioner.

January 26, 1894. Dismissed.

[Civil No. 412.]

THE FLORENCE CANAL COMPANY, Appellant, v.
THOMAS DAVIS, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

Kibbey & Israel, W. H. Barnes, and W. R. Stone, for Appellant.

H. B. Summers, Francis J. Heney, and William Herring, for Appellee.

January 29, 1894. Affirmed.

[Civil No. 377.]

SANTIAGO AINSA, Administratrix with the Will Annexed of Frank Ely, Deceased, Appellant, v. THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, et al., Appellees.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge.

Rochester Ford, and Selim M. Franklin, for Appellant.

William Herring, William Barnes, W. M. Lovell, and Maxwell & Satterwhite, for Appellees.

HAWKINS, J.—The facts in this case are the same as in No. 376, *ante*, p. 236, the complaint joining the same corporation with various settlers as defendants. The cause was tried, which developed such facts, and the court dismissed the bill of complaint on the ground of a want of jurisdiction to settle the title to an unconfirmed Mexican land grant, and, we think, properly. *Ainsa v. New Mexico etc. R. R. Co.* (No. 376), *ante*, p. 236, 36 Pac. 213. Judgment affirmed.

Baker, C. J., and Rouse, J., concur.

Filed January 29, 1894.

Reversed, 175 U. S. 76; 44 Law Ed. 78.

[Civil No. 423.]

THOMAS CARROLL, Appellant, v. JOHN GOODWIN,
Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

Baldwin & Johnston, for Appellant.

J. F. Wilson, for Appellee.

January 29, 1894. Affirmed.

[Civil No. 424.]

In the Matter of the Application of THOMAS BOYLE for
a Writ of Habeas Corpus, Appellant, v. THE TERRI-
TORY OF ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima.

John C. Kellum, for Petitioner.

Francis J. Heney, Attorney-General, for Respondent.

January 30, 1894. Denied.

[Civil No. 407.]

SANTA FE, PRESCOTT, AND PHOENIX RAILWAY
COMPANY, Appellant, v. JOHN J. FISHER et al.,
Appellees.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

Baldwin & Johnston, and E. M. Doe, for Appellant.

Herndon & Norris, for Appellee.

January 30, 1894. Affirmed.

[Criminal No. 89.]

THE UNITED STATES OF AMERICA, Respondent, v.
GEORGE PRICE, Appellant.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

Kibbey & Israel, for Appellant.

E. E. Ellinwood, U. S. District Attorney, for Respondent.

March 8, 1894. Reversed.

[Criminal No. 91.]

THE TERRITORY OF ARIZONA, Respondent, v. JOHN
LYALL, Appellant.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge.

Allen R. English, for Appellant.

Francis J. Heney, Attorney-General, for Respondent.

HAWKINS, J.—Indictment for conspiracy with Henry B. Turner et al. The defendants Turner and Lyall severed on the trial. The testimony is substantially the same as that in the case of *Territory v. Turner* (No. 90), *ante*, p. 197, 37 Pac. 368, and fails to show the conspiracy charged. The defendants may have been guilty of a misdemeanor, charged as the overt acts, or, from the testimony,—if the cattle killed at the time of their arrest were not their property, and the same were unlawfully and feloniously taken,—of grand larceny. They were not tried for these offenses. The motion to direct a verdict of not guilty should have been sustained. For these and the reasons stated (*Territory v. Turner, supra*) the judgment is reversed.

Baker, C. J., concurs,

March 8, 1894.

[Civil No. 415.]

MARTIN ALLEN, Appellant, v. THE ARIZONA COPPER COMPANY, a corporation, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge.

G. C. Israel, E. J. Edwards, Francis J. Heney, for Appellant.

Alexander Campbell, and M. J. Egan, for Appellee.

March 8, 1894. Dismissed.

[Criminal No. 96.]

In the Matter of the Application of D. M. LYNCH for a Writ of Habeas Corpus, Appellant, v. THE UNITED STATES OF AMERICA, Respondent.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

R. E. Sloan, and H. D. Ross, for Appellant.

E. E. Ellinwood, U. S. District Attorney, and J. C. Hern-don, for Respondent.

July 11, 1894. Writ denied.

[Criminal No. 97.]

In the Matter of the Application of THOMAS JACKSON for a Writ of Habeas Corpus, Appellant, v. THE UNITED STATES OF AMERICA, Respondent.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

R. E. Sloan, and H. D. Ross, for Appellant.

E. E. Ellinwood, U. S. District Attorney, and J. C. Haddon, for Respondent.

July 11, 1894. Writ denied.

[Criminal No. 98.]

In the Matter of the Application of CHARLES SALINE for
a Writ of Habeas Corpus, Appellant, v. THE UNITED
STATES OF AMERICA, Respondent.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Yavapai. John J. Hawkins,
Judge.

R. E. Sloan, and H. D. Ross, for Appellant.

E. E. Ellinwood, U. S. District Attorney, and J. C. Haddon, for Respondent.

July 11, 1894. Writ denied.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1895.

[Civil No. 433. Filed March 9, 1895.]

[39 Pac. 812.]

**JOHN M. EVANS, Plaintiff and Appellant, v. J. W.
BLANKENSHIP, Defendant and Appellee.**

1. **DEDICATION—PARKS—EVIDENCE.**—Land appearing upon a map of Neahr's Addition to the city of Phoenix as a park, with no other designation except the figures "570" on its sides and "300" on its ends, and among the references on the margin these words: "Public Grounds, 570-300," platted by a surveyor under the instructions of an agent of the owner, is sufficient dedication to the public, where the owner ratified such acts by making sales of lots in said addition, reference being had to this map for a more complete description of the property sold.
2. **SAME—SAME—PURPOSE OF—EVIDENCE—SUBSEQUENT DECLARATIONS.**—Evidence of letters written to the speaker of the territorial assembly by the owner subsequent to the dedication to the public to the effect that he offered it for a site for the territorial capitol cannot control, as at that time, the dedication being complete, he had no further control over it.
3. **SAME—SAME—ACCEPTANCE—NECESSITY FOR.**—The action of the city council, in 1888, ordering that the plaza in Neahr's Addition be cleaned up was a sufficient and timely acceptance by the city, if, in fact, any acceptance by it was necessary.
4. **SAME—SAME—TAXATION—ESTOPPEL.**—The assessment for municipal taxes of a park dedicated to the public does not estop the city from thereafter claiming it for park purposes.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa.
R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

W. H. Stilwell, for Appellant.

“Unless there appears an actual intent to dedicate on the part of the owner, the court cannot do otherwise than find that there was no dedication.” *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. 388.

Assent on part of owner must clearly appear. *Marcy v. Taylor*, 19 Ill. 634.

Must be unequivocal. *President v. Indianapolis*, 12 Ind. 620; *Harding v. Jasper*, 14 Cal. 642; *Holdane v. Cold Spring*, 21 N. Y. 477; *Quinn v. Anderson*, 70 Cal. 456, 11 Pac. 746; *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. 386.

Others must have acted in reference to and upon the faith of the acts from which dedication is claimed. *Oswald v. Grenet*, 22 Tex. 94; *Heirs of David v. New Orleans*, 16 La. Ann. 404, 79 Am. Dec. 586; *Connelian v. Ford*, 9 Wis. 221.

“Parties are not to be done out of their property by doubtful implications, no matter how much the public may be inconvenienced.” *Cerf v. Pflegling*, 94 Cal. 131, 29 Pac. 417.

Selling lots by unrecorded map gives no public right; only individuals can complain. *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; *Village of Grandville v. Jenison*, 86 Mich. 567, 49 N. W. 544.

Selling lots according to a map showing *vacant lots*, not referring to it as a “common,” vests no rights. *Oswald v. Grenet*, 15 Tex. 123; *Cerf v. Pflegling*, 94 Cal. 131, 29 Pac. 417.

Plaintiff in this case derails title through the probate court, not by deed from David Neahr, whose death in March, 1884, terminated all acts or intention on his part. See *Archer v. Salinas City*, 93 Cal. 16, 28 Pac. 839, for distinction made on above point.

The question of private rights does not enter into this case. Defendant does not attempt to show that David Neahr ever sold any lot in Neahr's Addition, described by deed or word as adjacent to any “park or square or common”; that any extra price was ever charged for such property; that any person ever purchased any lots by reason of any such representation. There is no showing that either Neahr, the city, or others ever attempted to use or improve such property as a park, square.

or common, or otherwise. *Village of Fulton v. Mehenfeld*, 8 Ohio St. 440; *Town of Van Wert v. Board of Education*, 18 Ohio St. 221.

The premises in question were not within the corporate limits of the city of Phoenix until March 11, 1885. (Act No. 61, Laws 1885, p. 101.) *Livermore v. City of Maquoketa*, 35 Iowa, 358; *Smith v. City of Osage*, 80 Iowa, 84, 45 N. W. 404, 8 L. R. A. 644.

If there was a dedication in 1880, the question arises, To whom was it made? Was it for church, school, territory, county, or to Phoenix, if it should ever be embraced in the city of Phoenix? These questions should appear from the evidence.

The burden of proving a dedication rests upon the party claiming it, and should clearly appear, particularly when the party claiming it is attempting to justify an unlawful act. Elliott on Roads and Streets, pp. 510, 511, 514, 515. Dedication: 2 Waterman on Trespass, pp. 17, 18, 20, 22, 23, 77, 81, 82; *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; *Hayward v. Manzer*, 70 Cal. 479, 13 Pac. 141; *Miller v. Town of Aricoma*, 30 W. Va. 606, 5 S. E. 148; *Kemper v. Collins*, 97 Mo. 644, 11 S. W. 235.

No act on part of city signifying an acceptance of a dedication is shown in the case prior to the commencement of this suit. *Littler v. City of Lincoln*, 106 Ill. 354; *Fisher v. Beard*, 32 Iowa, 346; *Holdman v. Village of Cold Spring*, 21 N. Y. 474; *Scott v. Des Moines*, 64 Iowa, 444; *City v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729; *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. 388, 32 Am. & Eng. Corp. Cases, 49.

The city had regularly assessed and collected municipal taxes from plaintiff since the premises in question were included in the corporate limits of the city of Phoenix until commencement of this suit. Estoppel by Taxation: *Adams Co. v. B. and M. R. R. Co.*, 39 Iowa, 507.

“A city is estopped to deny the ownership of real estate by a party whom it has permitted under a claim of right to occupy the same and pay taxes thereon levied by itself.” *Simplot v. City of Dubuque*, 49 Iowa, 630; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *Scott v. Des Moines*, 64 Iowa, 444, 20 N. W. 752; *Holdman v. Village of Cold Spring*, 21 N. Y. 474; *Lee v. Lake*, 14 Mich. 12, 90 Am. Dec. 220.

The city is estopped, first, by not asserting title and taking possession; second, by recognizing title in Neahr and Evans for six years and taxing them for four years. They stood by quietly and saw Evans fence the lots; then two years afterward tear the fence down and come into court and attempt to justify the act by a claim on the part of the public.

All the land herein was conveyed by Neahr to other parties within six months from the time Patrick claims to have made the plat. Had there been an intention to dedicate, such conveyance would have been a revocation thereof. *City of Chicago v. Drexel*, 141 Ill. 89, 37 Am. & Eng. Corp. Cases, 162, 30 N. E. 774.

The death of donor was a revocation of an offer of dedication, had there been one. *People v. Kellogg*, 22 N. Y. 490; *Hayward v. Manzer*, 70 Cal. 476, 13 Pac. 114.

Until 1885, blocks 16 and 17 were not within the corporate limits. Requiring stronger evidence of dedication: *Quinn v. Anderson*, 70 Cal. 457, 11 Pac. 746; *Onstott v. Murray*, 22 Iowa, 457; *Harding v. Jasper*, 14 Cal. 649. User must be for purpose intended. *Starr v. People*, 17 Colo. 458, 30 Pac. 64.

When the words of dedication are ambiguous, the contemporaneous acts and declarations of the donors and usage may be adverted to to explain them. *Tullis v. Young*, 6 Ohio, 294; *City of Cincinnati v. Hamilton County*, 7 Ohio, 88; *Dunn v. Cronise*, 9 Ohio, 82.

L. H. Chalmers, for Appellee.

“If the owner of a tract of land dedicate it to the public use as an open square of a city, for the convenience and accommodation of the inhabitants, the public acquire a vested right to its possession for that purpose, and the owner or his representatives cannot maintain an action of ejectment to recover possession of it. To constitute such a dedication, the legal title need not pass from its owner, nor is it necessary that any guarantee of the use should be in existence. All that is required is the assent of the owner of the land to its use, and the actual enjoyment of use for such a length of time that the public accommodation and private rights might be materially affected by the interruption of the enjoyment.” *City of Cincinnati v. White’s Lessee*, 6 Pet. 431. A careful

study of this case furnishes a liberal education on the subject of dedications. See, also, *New Orleans v. United States*, 10 Pet. 662.

The right of the public in such cases does not depend upon a twenty years' possession. Such a doctrine, applied to highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and private right.

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land and the fact of its being used for the public purposes intended by the appropriation.

The testimony of Alexander in the court below as to Neahr's intention to give this particular property to the territory for capitol grounds can cut no figure after its actual dedication by the ratification of the filing of the map in the office of the county recorder of Maricopa County, and the selling of the lands with reference to that map.

"A tract of land designated in the plat of a town, laid out in 1796 as the 'public square,' was thereby dedicated to the use of the town, and no subsequent disposition made of it by the original proprietors can affect such use. A person in the possession of said land deriving title under the original proprietor has no lien upon the land for the consideration, money, or improvements." *Hubert v. Gasley*, 18 Ohio, 18.

As said in this last case, "The use vested at the instant the first lot designated upon that plat found a purchaser."

"When the owner of land lays off a town or village thereon and makes a map of the town-site, showing it to be divided into streets, alleys, blocks, and lots, and then sells lots with reference to said map, he thereby makes an irrevocable dedication of the space represented on the map as streets to the use of the public, and if there be a public square, plaza, or plazas on the map, the same rule applies to them, and dedication thereof may be established in the same manner. The fact that the square after its dedication to the public was assessed to a person in the adverse possession thereof and all the taxes thereon were paid by him, does not impair the right of the public or estop the town from claiming under the dedi-

cation as against him." *Town of San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405.

This case is very similar to the case at bar in this, that the town of San Leandro was not incorporated until long after the dedication. The case also goes to show how far the courts will go on the question of taxation.

"A dedication may be made to the public by grant or through written instrument, or it may be evidenced by acts and declarations without writing. It may be made by the survey and plat alone, without any dedication either orally or on the plat. Where it is evidenced from the face of the plat that it was the intention of the proprietor to set apart certain ground for the use of the public, no particular act is required to constitute a dedication—it is purely a question of intention." *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866.

"Neither a subsequent deed by the proprietors nor their posterior declarations can affect the right." *Town of Lebanon v. Commissioners*, 9 Ohio, 80, 34 Am. Dec. 422.

"The immediate opening and use by the public of all the streets in ground laid out and platted into lots for their entire length, or an immediate formal acceptance by some competent public authority is not necessary to give effect to the dedication of land to the public use for streets by the making of a town plat and the sale of lots with reference to the plat. The public authorities must be allowed a reasonable time for opening and improving public streets as their resources and public necessity may allow and require. Where land has been dedicated to the public for streets by the acknowledgment and recording of the proper town plat under the statute, the dedication cannot be revoked by the owner, even before acceptance by the public. The proper authorities are not bound to accept such dedication at once." *Town of Lakeview v. John Bahn*, 120 Ill. 92, 9 N. E. 269.

"Declarations of an agent employed to lay out a town and make a plat, afterwards acted upon by his principal, made while engaged in the work, to the effect that a certain strip of ground was reserved for a street, are admissible to prove a dedication of the land to that use." *Barclay v. Howells*, 6 Pet. 202.

See on the general questions raised by this discussion:

Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350; *Fulton v. Town of Dover*, (Del. Ch.), 6 Atl. 633; *Smith v. City of Portland*, 30 Fed. 734; *Donohoo v. Murray*, 62 Wis. 100, 22 N. W. 167; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639.

BETHUNE, J.—This is an action of trespass instituted by plaintiff, the appellant here, on the thirteenth day of June, 1891, against defendant and appellee, who was the city marshal of the city of Phoenix, for tearing away a fence erected by plaintiff around a tract of land in what is known as “Neahr’s Addition to the City of Phoenix,” and claimed by plaintiff as his property in fee, under a deed from the executor of David Neahr, deceased, dated July 25, 1885. Defendant admitted tearing away the fence, and justified as such city marshal, acting under the duties of his office. It is stipulated in this case, among other things, that on the fifth day of October, 1875, one David Neahr became the owner in fee simple of the northeast quarter of section 7, township 1 north, range 3 east, Gila and Salt River Meridian, containing one hundred and sixty acres, and that the land in dispute in this action is a part of said quarter-section; “that about the year 1880 said David Neahr, then being the owner of said quarter-section of land, platted the same into lots, block, streets, and alleys”; and that said David Neahr made sales of divers lots of land in Neahr’s Addition to the city of Phoenix during his lifetime, reference being had to the map of one Patrick, a surveyor, for a more complete description of the property sold; “that said David Neahr died prior to April 25, 1884.”

The question in this case is whether or not the lot of the land in dispute was dedicated by Neahr in his lifetime as a public square. The land in dispute appears on a map (which is a part of the record in this case) as a park laid out in walks, with a circle in the center, and is in size double that of the surrounding blocks or squares, which are cut up into lots, and divided from each other and the land in dispute by streets and alleys. There is no other designation given to this tract in dispute than that mentioned, except the figures “570” on its sides and “300” on its ends, and among the references on the margin of the map these words: “Public Grounds, 570-300.” This map, as the record shows, is a copy of a map of Neahr’s Addition to the city of Phoenix made by H. L. Pat-

rick, a surveyor, on the sixth day of March, 1880, and filed by him in the office of the county recorder of Maricopa County on that day. It was shown that the original map, after being in the recorder's office some time, had become much worn, and "about to fall to pieces," and about the year 1889 or 1890 was copied into a book in the recorder's office, at the instance of the city council of Phoenix, since which time the original became lost, and could not be found. It is contended by appellant that the evidence fails to show that the map relied on is a copy of a map made by David Neahr, or authorized to be made by him, of his addition to Phoenix; but we think the evidence on that point admits no other conclusion than that the map offered in evidence was a copy of the original, and the only map of Neahr's Addition made by Patrick. Patrick himself testifies that it was, and Osborn, the county recorder, testifies that it was a copy of the map which Patrick filed in the recorder's office, which he saw in 1883, and which remained there from that time until 1889. There is no evidence contradicting these two witnesses, or establishing any other hypothesis than the fact that this map was the only one made by Patrick of Neahr's Addition. The record discloses the fact that Patrick made the map at the instance of one De Forrest Porter, with whom David Neahr made a contract during his lifetime, to wit, May 3, 1879, placing in the hands of said Porter, for sale and disposal, the said northeast quarter-section of land comprising Neahr's Addition, and agreeing that said Porter should have full control of said property "in negotiating sales thereof, and in placing the same on the market"; and, using the language of the contract, "it is further agreed that the last described tract of land [said northeast quarter] is to be subdivided into lots, the size and numbers as shall be determined upon by the parties hereto hereafter, and shall be sold according to subdivisions so made." Appellant claims that none of the acts of Porter and Patrick amounted to a dedication by Neahr of the land in question; and, truly, they might not have, had no action been taken by Neahr to ratify and indorse the acts of them both by his making sales of divers lots of land in Neahr's Addition, reference being had to this map made by Patrick, at the instance of Porter, for a more complete description of the property sold, which the stipulation shows he did. "His sanction, when

given, relates back to the original transaction, and gave equal effect to it as if he, the principal, had been present." *Barclay v. Howell*, 6 Pet. 498. These acts of Neahr show an irrevocable dedication of the land in question to the public, and the fact of recording or not recording the map makes no difference. "The mere act of surveying land into lots, streets, and squares by the owner will not amount to a dedication; yet the sale of land with reference to such plat, map, or plan, whether recorded or not, will amount to an immediate and irrevocable dedication of such streets, etc., so far as the owner is concerned." Dillon on Municipal Corporations, chap. 17, sec. 505; *United States v. City of Chicago*, 7 How. 185, 5 Am. & Eng. Ency. of Law, pp. 405-407, and many cases cited.

Purpose of the dedication: Appellant contends that, if there was any dedication of this land to the public, it was only for the purpose of a site for capitol grounds when this territory should become a state, and introduced evidence that several times, beginning in the year 1883, David Neahr offered the land for that purpose in letters to the speaker of the house of the territorial assembly. But at that time, the dedication to the public having been complete, Neahr had no further control over it. *Huber v. Gazley*, 18 Ohio, 18; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *Town of Lebanon v. Commissioners*, 9 Ohio, 80, 34 Am. Dec. 422. While a party may sometimes testify as to his original intention in regard to the dedication to the public, the dedication is generally proved by evidence of the owner's acts, together with the surrounding circumstances. *Bidinger v. Bishop*, 76 Ind. 244; *McKee v. Perchment*, 69 Pa. St. 342, 24 Am. & Eng. Ency. of Law, p. 9, and cases cited. By reference to the map of Neahr's Addition in the record of this case, it will be observed that the street which would run through this land if extended is marked on the map as "Park Avenue," on both sides of the tract, which furnishes some evidence that the donor intended that the tract should be a park, whatever ideas he may afterwards entertained of its becoming a site for the capitol building.

As to the acceptance by the city of Phoenix: "In order to dedicate property for public use in cities and towns and other

places, it is not essential that the right to use the same shall be vested in a corporate body. It may exist in the public, and have no other limitation than the wants of the community at large." *New Orleans v. United States*, 10 Pet. 662. "And, where such lots and streets dedicated by plat are afterwards included in an old and adjoining town by extending the corporate limits thereof, no proceedings by the corporate authority for the condemnation of any such streets are necessary. They are already public streets by prior dedication." *Fulton v. Town of Dover*, 6 Del. Ch. 1, 6 Atl. 633. "The open square in a town may be dedicated to the public by its owner, and a formal acceptance by the town is not necessary to make the dedication complete. Acceptance may be presumed if the gift is beneficial, and user is evidence that it is beneficial. No particular length of time is necessary to make a dedication binding." *Abbott v. Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325. "The public authorities must be allowed a reasonable time for opening and improving public streets, as their resources and public necessity may allow and require." *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269; *Meier v. Railway Co.*, 16 Or. 500, 19 Pac. 610. This land did not become a part of the city of Phoenix until the year 1885, but certainly it had been accepted on the part of the public by those persons who had bought lots in the addition. *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839. And on the 6th of February, 1888, the city council of Phoenix, upon the petition of several citizens that the plaza in Neahr's Addition be cleared, plowed, and ditched, instructed the street and alley committee to "clear up the plaza." This alone, we think, was a sufficient and timely acceptance by the city, if, in fact, any acceptance by it was necessary.

The only remaining point to be noticed is as to the estoppel of the city by reason of its having assessed this land for municipal taxes. On that point we are satisfied with the doctrine enunciated in the case of *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405, wherein the court says: "When the block was dedicated to the use of the public as a public square, it became a part of the public grounds of the town, and could not be legally assessed or taxed for state, county, or municipal purposes; and the erroneous action of officials in the respects named could not impair the rights of the public or confer

rights upon the defendant. The doctrine of estoppel has therefore no application."

The judgment of the district court is affirmed.

Rouse, J., and Hawkins, J., concur.

Baker, C. J., having been of counsel for the appellee in the court below, took no part in the decision of said cause. -

[Civil No. 430. Filed March 25, 1895.]

[39 Pac. 809.]

NAT E. HAWKE, Plaintiff and Appellant, v. A. WENTWORTH, Defendant and Appellee.

1. ACTION—DISMISSAL—CROSS-BILL—REV. STATS. ARIZ. 1887, TIT. 62, CITED.—Where plaintiff has dismissed his complaint, filed under the provisions of the statute, *supra*, for possession of the office of the clerk of the board of supervisors, the trial court did not err in refusing to dismiss the action on plaintiff's motion and in proceeding with the trial to judgment on defendant's answer or cross-complaint, the cross-complaint containing facts which constituted a cause of action against plaintiff for usurpation of said office, he having in the mean time, and after filing suit, taken possession of the office before the right thereto could be heard on his own complaint.
2. COUNTY OFFICERS—CLERK OF BOARD OF SUPERVISORS—ELECTION—REV. STATS. ARIZ. 1887, PAR. 390, CITED—HOLDS OFFICE AT PLEASURE OF BOARD—REV. STATS. ARIZ. 1887, PAR. 3049, CITED.—The clerk of the board of supervisors is elected by the board of supervisors. Par. 390, *supra*, cited. The office is held at the will of the board. They can remove one and appoint one at pleasure. Par. 3049, *supra*, cited.
3. SAME—BOARD OF SUPERVISORS—QUALIFICATION OF MEMBERS—RIGHT TO OFFICE—POWER OF BOARD TO DETERMINE—JURISDICTION OF DISTRICT COURT—REV. STATS. ARIZ. 1887, TIT. 62, CITED.—Members of a board of supervisors have no authority to pass upon the question of a co-member's title to or qualifications for the office. Those questions can only be determined by the district court in proceedings instituted therein for that purpose. Statute, *supra*, cited.
4. SAME—SAME—VACANCY—HOW FILLED—REV. STATS. ARIZ. 1887, PAR. 388, CITED.—A vacancy caused by the resignation of a member

of the board of supervisors can only be filled by an election by the remaining supervisors and the probate judge. Statute, *supra*, cited.

5. COURTS—DUTY—PEACE—SHOULD PRESERVE WHERE BREACH THREATENED IN REGARD TO MATTERS WITHIN THEIR JURISDICTION AND CONTROL.—The judiciary, having jurisdiction of a matter, should use the authority vested in it to prevent continuance of acts which tend to impair the credit of the county and constitute a breach of the peace.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. R. E. Sloan, Judge. Affirmed.

Statement of facts by Rouse, J.

This is an action by Hawke against Wentworth for the office of clerk of the board of supervisors of Cochise County, under the provisions of title 62 of the Revised Statutes. Plaintiff, after obtaining leave to institute this action, on August 21, 1893, filed his complaint, alleging that on or about the third day of January, 1893, he was legally and properly elected and appointed to the office of clerk of the board of supervisors of Cochise County, and duly qualified as such according to law, and entered upon the duties of said office, and was in possession of said office, and the books thereof, on the 6th of July, 1893; that on the date last mentioned, defendant, in collusion with James Reilly and James P. McAllister, the said Reilly and McAllister then and there unlawfully and wrongfully assembled at the courthouse in said county as a board of supervisors of said county, and then and there unlawfully elected and appointed said defendant, Wentworth, to plaintiff's said office of clerk of the board of supervisors of said county; and that said defendant then and there did usurp and take possession of said office, and plaintiff was excluded therefrom by defendant. To this complaint defendant filed an answer in the nature of a cross-complaint, averring that he was duly elected and appointed clerk of the board of supervisors of Cochise County on July 7, 1893, and duly qualified as such on that date, according to law, and that on that date plaintiff had possession of said office, and the books and papers thereof; that on that date he instituted suit in the probate court of said county against plaintiff to

recover the books, papers, and records of said office, and that on the — day of July, 1893, judgment was rendered by said court in favor of defendant against plaintiff for the said books, etc., and that thereafter, on the thirteenth day of July, under the proper writ from said court, duly executed by a proper officer, the said books, papers, and records of said office were delivered to defendant; that thereafter, on September 8, 1893, while defendant was in possession of said office, and the books, papers, and records thereof, plaintiff, with the aid of the sheriff of said county and other persons, forcibly and unlawfully entered into the room or office of the clerk of the board of supervisors, and expelled defendant therefrom, and took possession of said books, papers, and records, and plaintiff since that date, September 8, 1893, has had possession of said office, books, papers, and records. Defendant demanded judgment for the possession of said office, books, papers, and records. The case coming on for trial, plaintiff dismissed his complaint, and the trial was had on defendant's cross-complaint, against plaintiff's objections, and judgment was entered for defendant, and from that judgment plaintiff appeals.

At the general election, 1890, Scott White was elected supervisor of Cochise County for a term of four years, commencing January 1, 1891, and duly qualified as such, and entered upon the duties thereof. At the general election, 1892, W. K. Perkins and James P. McAllister were elected supervisors of said county for terms of two years, commencing January 1, 1893, and duly qualified and entered upon the discharge of the duties thereof. McAllister at the date of his election was the treasurer of said county for a term ending December 31, 1892. The board of supervisors on January 1, 1893, was composed of Scott White, W. K. Perkins, and James P. McAllister. On January 3, 1893, the board duly elected and appointed Hawke, this plaintiff, clerk of the board of supervisors, and he immediately qualified as such, and entered upon the discharge of the duties of said office. Immediately after the election of plaintiff as clerk, White and Perkins, as supervisors, and Hawke, as clerk, refused to recognize McAllister as a member of the board of supervisors, and McAllister applied to the district court for a *mandamus* to compel the said parties to recognize him as such officer.

This suit he prosecuted to a successful termination in the district court. The defendants appealed to this court, and said judgment was affirmed. *Ante*, p. 150, 36 Pac. 170. About January 9, 1893, White and Perkins passed a resolution, and had it entered upon the minutes of the board of supervisors, declaring, in effect, that McAllister was not a supervisor, and that there was a vacancy. This vacancy they proceeded to fill by electing one E. A. Nichols, who proceeded to qualify and act as a supervisor. Thereafter, on January 12th, White resigned, and Perkins and Nichols proceeded to elect one Frank Hare to fill the vacancy caused by White's resignation. The board, as then formed, consisted of Perkins, elected at the general election in 1892; Nichols, elected by White and Perkins to fill a supposed vacancy by the removal of McAllister; and Hare, elected by Perkins and Nichols to fill the vacancy caused by White's resignation. On July 6, 1893, after due notice to Perkins, McAllister and Mormonier, probate judge, met and elected James Reilly supervisor to fill the vacancy caused by White's resignation. Reilly immediately duly qualified according to law, and he and McAllister entered the office of the board of supervisors, where Perkins, Nichols, and Hare were then assembled as a board of supervisors, with plaintiff as clerk. Reilly and McAllister demanded of Perkins to be recognized by him as members of the board. Perkins declining to do so, Reilly was chosen chairman of the board, and the board adjourned until the next day. On the 7th of July the board met, Reilly and McAllister being present, Perkins absent. The defendant was elected clerk of the board of supervisors, and he duly qualified and entered upon the discharge of the duties thereof. Defendant then instituted proceedings in the probate court against Hawke to gain possession of the books, papers, and records of the office of clerk of the board of supervisors, obtained judgment, and was put in possession thereof; and thereafter plaintiff, with the aid of the sheriff, Scott White, and other persons, took possession of the room or office of the clerk, and took the books, papers, and records of said office, and, at the time of filing of said answer and cross-complaint, plaintiff had possession thereof. Judgment was entered for defendant. From this judgment plaintiff appeals.

Heney & Ford, for Appellant.

This case having been tried on the cross-complaint of the defendant, the burden of proof is on him to establish by a preponderance of the evidence that he is the *de jure* clerk of the board of supervisors of Cochise County.

The title to an office can never be tried collaterally. Persons in the actual and unobstructed exercise of office must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves. Mechem on Public Officers, sec. 330; *Stockle v. Silsbee*, 41 Mich. 615, 2 N. W. 900; *Johns v. People*, 25 Mich. 499; *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Cahill v. Insurance Co.*, 2 Doug. 24; *Druse v. Wheeler*, 22 Mich. 439; *Kaufman v. Stone*, 25 Ark. 336; *Eaton v. Harris*, 42 Ala. 491; *Cooper v. Moore*, 44 Miss. 386; *Gumberts v. Express Co.*, 28 Ind. 181; *State v. Lewis*, 22 La. Ann. 33.

A certificate of election is not conclusive evidence of title, and is not necessary to entitle to office. *Magee v. Board of Supervisors*, 19 Cal. 377.

No judicial declaration of a vacancy is absolutely necessary. The authority authorized to fill a vacancy, supposing the office to be vacant by reason of *prima facie* acts or events, may proceed before procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office. *Ellison v. Aldermen of Raleigh*, 89 N. C. 125; *Meredith v. Board of Supervisors*, 50 Cal. 433; *Cooke v. Halsey*, 16 Pet. 70.

James Reilly, and Allen R. English, for Appellee.

First. If J. P. McAllister was elected to the office of supervisor at the general election held November 7, 1892, received certificate thereof, took the oath of office, and gave bond approved and filed as required by law, and on the first judicial day of January, 1893, entered on said office, then he was a lawful supervisor of the county until he resigned in July, 1893, and the question of his eligibility to that office, on the ground that on the day of said election he held an incompatible office, could not be questioned by any one, or in any way, except in an action instituted for that purpose by some officer or person mentioned in and as provided by title LXII of

the Revised Statutes of Arizona, or in an action in which he put his title in issue. *Vogel v. State*, 107 Ind. 374, 8 N. E. 164; *Smith v. Moore*, 90 Ind. 294. And the resolution of the board on the ninth day of January, 1893, declaring the office of said Supervisor McAllister vacant was absolutely void, and the pretended election of E. A. Nichols to fill said pretended vacancy was equally void. *Hawke v. McAllister*, ante, p. 150, 36 Pac. 170.

Second. When Scott White resigned his office as supervisor on January 13, 1893, the board empowered to fill the vacancy caused thereby consisted of the probate judge of the county and Supervisors Perkins and McAllister, and the pretended election of Frank Hare by Supervisor Perkins to fill that vacancy, without the concurrence of either said judge or said McAllister, was absolutely void, and did not prohibit any two of said board from electing a proper person, in a lawful way, to fill said vacancy. Rev. Stats. Ariz., par. 388; *Hawke v. McAllister*, ante, p. 150, 36 Pac. 170.

Third. If the probate judge of the county did not approve the bonds of said Nichols or Hare, or either of them, as supervisors, then they were not, nor was either of them, acting under color of office, and their acts as supervisors are absolutely void, except in cases where the public interest requires their acts to be sustained.

Fourth. When, after the resignation of Scott White, the probate judge of the county and Supervisor McAllister met in June, 1893, at the county courthouse, after due notice of the time, place, and object of said meeting had been served on Supervisor Perkins, to elect a supervisor to fill the vacancy caused by the resignation aforesaid, and elected James Reilly a supervisor, such election was valid, and when he took the oath and gave bond, approved and filed as required by law, he, said Reilly, was a lawful supervisor, and the board then consisted of Chairman Perkins and Supervisors McAllister and Reilly, and a majority of that board had full power to change their chairman and clerk at will, particularly so if the chairman and clerk refused and failed to do their duty. Rev. Stats. Ariz., par. 3049.

Fifth. The plaintiff, Nat E. Hawke, being clerk of the board, and refusing to enter on the minutes of the board the action of the majority of the board, thereby forfeited his

office, and the majority had ample power, and it was their duty, to appoint his successor, and when the majority appointed Antioch Wentworth, defendant, clerk of the board, and he qualified as required by law, he became the lawful officer, and when he got possession of the books and furniture of the office, on the tenth day of July, 1893, by judgment and execution of the probate court, he was the *de facto* and the *de jure* clerk of the board, and when the said Nat E. Hawke, on the eighth day of September, 1893, took forcible possession of the office, books, and furniture, he thereby committed a crime, and cannot have acquired any right thereby.

ROUSE, J. (after stating the facts).—1. The first question presented for our consideration is the action of the district court in proceeding to the trial of the case on the answer or cross-bill of defendant, after plaintiff had dismissed his complaint. This suit was based upon the provisions of title 62 of the Revised Statutes, a statute giving a specific right to try the title to an office. The matter in controversy was “the title to the office of clerk of the board of supervisors.” At the time of filing the complaint, plaintiff was not in possession of the office. He sued to gain possession. He forced defendant into court on that issue. Defendant met the issue by claiming he was in possession by right, and that after being brought into court plaintiff had wrongfully re-entered and ousted him. The title to the office was the matter in dispute at the date the complaint was filed, and remained the matter in dispute at the date of the trial. Rev. Stats., title 62. The court did not err in refusing to dismiss the action on plaintiff’s motion, and in proceeding with the trial to judgment on defendant’s answer or cross-complaint. The cross-complaint contained facts constituting a cause of action against plaintiff for usurping the office of clerk of the board of supervisors, and could be properly treated by the court as an action on behalf of defendant against plaintiff for said office, and a trial thereon against plaintiff was proper; particularly inasmuch as it was averred therein that plaintiff, after instituting the suit to try the title thereto by leave of the court, had taken the matter in hand, and by his own illegal acts had taken possession of the office before the right thereto could be heard and determined on his complaint by the court.

2. The board of supervisors on January 3, 1893, consisted of Scott White, W. K. Perkins, and James P. McAllister, all elected by the people, the first at the general election in 1890, and the other two at the general election in 1892. On the said 3d of January, 1893, plaintiff was duly elected clerk of the board of supervisors. The clerk of the board of supervisors is elected by the board of supervisors. Rev. Stats., par. 390. The office of clerk of the board of supervisors is held at the will of the board. They can remove one and appoint one at pleasure. Id., par. 3049. Plaintiff, therefore, could only hold his office during the pleasure of the board of supervisors.

3. White and Perkins, as members of the board of supervisors, on January 9, 1893, declared a vacancy existed in the board of supervisors; that McAllister was not a member thereof; and they proceeded to elect E. A. Nichols to fill said vacancy. In other words, they declared that McAllister was not a supervisor, and filled the supposed vacancy by electing Nichols. White and Perkins possessed no authority to pass on the question of McAllister's title to or qualification for the office. Those questions can only be determined by the district court in proceedings instituted therein for that purpose. Rev. Stats., tit. 62. The acts of White and Perkins in the attempted removal of McAllister, and the election of Nichols, were void, and McAllister did not thereby lose the office of supervisor, and Nichols did not become a member of the board of supervisors. It follows from the above statement that Perkins and Nichols did not confer any right on Frank Hare in their proceedings in electing him to the office of supervisor to fill the vacancy caused by White's resignation. Perkins and McAllister, after White's resignation, were the only members of the board of supervisors. The vacancy caused by White's resignation could only be filled by an election by the remaining supervisors and the probate judge. Rev. Stats., par. 388. No such election was held to fill the vacancy until July 5, 1893. At that time McAllister and the probate judge, after having served notice on Perkins to attend for that purpose, elected James Reilly supervisor. Reilly qualified according to law, and then the board consisted of Perkins, McAllister, and Reilly. The board of supervisors, as thus composed, on July 7th, elected and appointed defendant clerk of the board of supervisors. This board had the power to

remove plaintiff, and to appoint defendant. Id., pars. 390, 3049. Defendant was the duly elected and appointed clerk of the board of supervisors from the seventh day of July, 1893, and as such entitled to the office, books, papers, and records of said office. It is not necessary that we should determine the effect of the acts of Perkins, Nichols, and Hare from the date of White's resignation. Those acts, aside from the title of defendant to the office of clerk of the board of supervisors, are not now in question, and may never come up for consideration. During that period McAllister was pressing his claim to the office of supervisor in the courts, and had been successful. He had applied for and secured a writ of *mandamus* to compel this plaintiff and associates to recognize him. The issue presented by him had terminated in his favor, but the remedy was withheld on the application for an appeal granted on plaintiff's application. Defendant, likewise, when entitled to the office of clerk of the board of supervisors, and the books, papers, and records thereof, resorted to the courts for relief. After the relief was granted, and he was placed in possession of the defendant's office, etc., plaintiff by force, and without any legal or authorized power, took possession of the defendant's office, books, papers, and records, and, when defeated, resorted to an appeal, pending which he remained in office to the end of defendant's term of office. Under the circumstances, we feel that it is proper that we should suggest that the judiciary, having jurisdiction of the matters, should have used the authority vested in it to prevent the continuance of the acts and conduct mentioned, to the end that the fair reputation of the people of a good county for law and order would not have been tarnished, and the credit of the county would not have been impaired, by the effect of the issuance of demands against the county by two separate boards of supervisors. We are satisfied that the parties whose acts are declared to be illegal were not actuated by any impure motives, other than a selfish personal and individual pride in each to not be outdone by an opponent.

Bethune, J., and Hawkins, J., concur.

Baker, C. J., took no part in this case.

[Criminal No. 99. Filed April 30, 1895.]

[41 Pac. 442.]

HENRY BLEVINS, Defendant and Appellant, v. THE TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW — UNLAWFUL BRANDING — REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 969—INDICTMENT—INSUFFICIENCY—FAILURE TO ALLEGE INTENT TO CONVERT.—An indictment for branding the calf of another, under the statute, *supra*, is demurrable, it failing to state one of the essential elements of the offense to punish which the said statute was enacted,—to wit, the intention of defendant to convert the animal branded to his own use.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

Kibbey & Israel, for Appellant.

Francis J. Heney, Attorney-General, and E. J. Edwards, for Respondent.

BETHUNE, J.—On the twenty-eighth day of October, 1894, defendant and appellant was accused of a felony under an indictment, the charging part of which is as follows: "Henry Blevins is accused by the grand jury of the county of Gila, territory of Arizona, duly impaneled and sworn, by this indictment, found this 28th day of October, 1894, of the crime of felony, committed as follows: The said Henry Blevins, on or about the 1st day of August, 1894, and before the finding of this indictment, at the county of Gila, territory of Arizona, did willfully and unlawfully and feloniously one certain red and white bull calf, an animal of the value of five dollars, and the property of Nick Egan, brand with a certain LL brand, such LL brand being then and there the brand of him, the said Henry Blevins, and not the recorded brand of him, the said Nick Egan, the owner of said bull calf." Defendant demurred to this indictment on the grounds that it does not state facts sufficient to constitute a crime against the laws of

the territory, and that it does not comply with paragraph 969 of the Penal Code of the Revised Statutes of Arizona, and it is therefore insufficient in law. Paragraph 969 of the Penal Code of this territory, under which this prosecution was brought, is as follows: "Any person who shall brand or mark, or cause to be branded or marked, with his brand or any other brand not the recorded brand of the owner, any animal being the property of another, or who shall efface, deface, or obliterate any brand or mark upon any animal with intent to feloniously convert the same to his own use, is punishable in the territorial prison not less than one year nor more than ten years, and shall also be liable to the owner of such animal for three times the value thereof: and in no case shall the payment of the penalty herein mentioned entitle the person so branding, defacing or obliterating a brand to the property in the animal so branded, or upon which the brand was effaced, defaced, or obliterated; but such animal shall be surrendered to the proper owner." The demurrer of defendant was overruled, and he was convicted, and appealed to this court. The demurrer should have been sustained, as the indictment failed to state one of the essential elements of the offense to punish which section 969 of the Penal Code was enacted,—to wit, the intention of defendant to convert the animal branded to his own use. Judgment reversed and cause remanded, with instructions to the lower court to sustain the demurrer to the indictment.

Baker, C. J., and Hawkins, J., concur.

[Civil No. 456. Filed May 6, 1895.]

[40 Pac. 185.]

G. N. ADAMS, and ISAAC TITUS, Executors of the Estate of I. S. Titus, Deceased, Plaintiffs and Appellees, v. THE DIRECTORS OF THE INSANE ASYLUM OF ARIZONA, Defendants and Appellants.

1. OFFICERS—SALARY—DE FACTO OFFICER'S RIGHT TO—IN ABSENCE OF DE JURE OFFICER—BEHAN v. DAVIS, 3 ARIZ. 399, 31 PAC. 521, FOLLOWED.—An officer *de facto* is entitled to the salary of the office

for the performance of the duties thereof, there being no *de jure* officer. *Behan v. Davis, supra*, followed.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

Francis J. Heney, Attorney-General, for Appellants.

Payment having been made to Toney, Titus, who was only a *de facto* officer, cannot recover the amount of salary from the territory. *Shaw v. Pima County*, 2 Ariz. 399, 18 Pac. 273; Mechem on Public Officers, sec. 332.

Even if Titus had been a *de jure* officer, he cannot recover from the territory; his remedy is against Toney. *Shaw v. Pima County, supra*; Mechem on Public Officers, sec. 871.

To recover from the public the salary attached to an office, the officer must show that by a lawful election and qualification he is the officer *de jure*. A mere *de facto* officer cannot recover. Mechem on Public Officers, sec. 867.

Alexander & Stilwell, for Appellees.

This court held in the Behan case, 3 Ariz. 399, 31 Pac. 521, that Ingalls was not entitled to pay as the superintendent of the prison, but that Behan was, as the officer *de facto*, and under the same facts as in the case at bar. Titus, as officer *de facto*, performed the services, and the territory received the benefits of such performance. Toney was neither *de facto* nor *de jure* officer during the period in question. Toney got the money Titus was entitled to, and to refuse Titus payment would be a fraud.

BETHUNE, J.—On the nineteenth day of May, 1888, I. S. Titus was appointed by the board of directors of the insane asylum of this territory the resident physician and superintendent thereof, and performed the duties of said office from the first day of June, 1888, when he qualified, until the nineteenth day of June, 1890, when it was adjudged by the district court of the second judicial district of this territory in and for the county of Maricopa that said Titus was not legally entitled to hold said office, on the ground that the governor

of the territory alone had power to appoint a person thereto; but on the first day of October, 1889, a new board appointed L. C. Toney as the resident physician and superintendent, who, as the record shows, was not within the territory from that time until June 19, 1890. The board of directors refused to pay Titus any of the salary from the 1st of October, 1889, to June 19, 1890, notwithstanding he performed the duties of the office in the absence of Toney, but did pay it to Toney by its warrant on the treasurer of the territory. Titus in his lifetime brought this action to compel the board of directors to draw its warrant on the treasurer of the territory for the sum claimed by him as salary from October 1, 1889, to June 19, 1890, and, dying pending the litigation, his executors, appellees, were substituted as plaintiffs, and judgment was rendered in their favor in the court below, from which judgment defendants appeal to this court. There is no dispute as to the facts in the case, but appellants contend that, payment having been made to Toney, Titus being only a *de facto* officer, cannot recover from the territory or the board the amount claimed to be due him. This would certainly be true had Toney been a *de jure* officer, but, he being neither a *de jure* nor a *de facto* officer, the payment made to him was without any reason or warrant of authority whatever, and could not affect Titus's right. The case of *Behan v. Board of Prison Commissioners*, 3 Ariz. 399, 31 Pac. 521, is almost on all fours with this case, in principle. As said in that case: "Prior to the bringing of the suit in the district court by the attorney-general against Behan, it had been the practice that the superintendent should be appointed by the board of prison commissioners, and the legality of that practice, up to the time of the judgment of ouster against Behan, seems to have been unquestioned." In that case, as in this, there was no *de jure* officer, and Behan, having performed the duties as superintendent under the appointment of the board of prison commissioners (who it was afterwards adjudged had no power to appoint), was awarded the salary attached to that office. Following the principle of that case, we think the judgment in this case should be affirmed, and it is so ordered.

Hawkins, J., and Rouse, J., concur.

[Civil No. 449. Filed May 8, 1895.]

[40 Pac. 209.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. JAKE FALSHAW et al., Defendants and Appellees.

1. COURTS—TERRITORIAL—CASES ARISING UNDER UNITED STATES LAWS—REV. STATS. U. S., SEC. 1910, CITED—JURISDICTION—ATTENDANCE OF WITNESSES FOR INDIGENT DEFENDANTS—REV. STATS. U. S., SEC. 878, CONSTRUED—PAYMENT.—Under section 1910, *supra*, conferring upon the territorial courts the same jurisdiction in all cases arising under the constitution and the laws of the United States as is vested in the circuit and district courts of the United States, in a criminal case arising under the laws of the United States the court has power to make an order for the attendance of witnesses in behalf of indigent defendants, and it is the duty of the United States to furnish means for the attendance of such witnesses. Section 878, *supra*, construed.

APPEAL from a judgment of the District Court of the Second Judicial District. Owen T. Rouse, Judge. Dismissed.

The facts are stated in the opinion.

E. E. Ellinwood, U. S. District Attorney, for Appellant.

HAWKINS, J.—On the trial of the cause in the district court, defendants (appellees) having been indicted for robbery of the United States mail, made application by affidavit, under section 878 of the Revised Statutes of the United States, asking that certain witnesses be subpoenaed for their defense at the expense of the United States, and that they be paid by said appellant such per diem for their attendance as the statutes of the United States provide to be paid witnesses subpoenaed on behalf of the United States. This application was allowed by the court, and from such order appellant undertakes to prosecute an appeal to this court.

The record does not disclose the result of the action. I do not think it necessary in this cause to go to any great extent into the question of the power and jurisdiction of the court trying these defendants. It may be said, however, that it is a territorial court, and in addition to its common-law powers, and the jurisdiction conferred upon it by the territorial stat-

ute, it is given the same jurisdiction, by Congress, in all cases arising under the constitution and the laws of the United States, as is vested in the circuit and district courts of the United States. Rev. Stats., sec. 1910. The case at bar is one arising under the laws of the United States. Section 878 of the Revised Statutes vests jurisdiction in a "court of the United States" to make an order for the attendance of witnesses in behalf of indigent defendants. The territorial court trying these defendants (Rev. Stats., sec. 1910) had the same jurisdiction. The appellant has not been injured by the order. It was his duty to furnish means for the attendance of such witnesses. I do not think an appeal lies from such order. The appeal is dismissed.

Baker, C. J., and Bethune, J., concur.

[Civil No. 425. Filed May 13, 1895.]

[40 Pac. 313.]

COUNTY OF MARICOPA, Defendant and Appellant, v.
NERI OSBORN, Plaintiff and Appellee.

1. APPEAL AND ERROR—COUNTY—APPEAL-BOND.—A county, as a political subdivision of the territory, does not have to file an appeal-bond to maintain an appeal.
2. SAME—BILL OF EXCEPTIONS—NECESSITY FOR—MOTION FOR NEW TRIAL—PUTNAM v. PUTNAM, 3 ARIZ. 182, 24 PAC. 320; TIETJEN v. SNEAD, 3 ARIZ. 195, 24 PAC. 324; WOLFLEY v. GILA R. I. Co., 3 ARIZ. 176, 24 PAC. 257, FOLLOWED.—Where the motion for a new trial is not embodied in the bill of exceptions the points therein contained cannot be considered. Cases, *supra*, followed.
3. OFFICE AND OFFICERS — COUNTY RECORDER — FEES — RECORDING TAX-DEEDS—COUNTY CHARGE—REV. STATS. ARIZ. 1887, PAR. 2703, CITED—PAYMENT HOW PROVIDED—REV. STATS. ARIZ. 1887, PAR. 2709, 2710, CITED.—A county recorder cannot recover fees from the county for services in filing and recording tax-deed and tax-certificates. Par. 2703, *supra*, providing for the recording without charge to the county. The payment of the fees of the recorder is provided for out of money collected for taxes by paragraphs 2709 and 2710, *supra*.

4. STATUTES—PASSAGE—REQUISITES—ACT OF APRIL 2, 1889.—The act *supra*, never became a law, for the reason it was not signed by the governor; nor was it returned to the legislative assembly with his objections and passed over his veto; nor did it remain in his hands ten days during the existence of the legislature.
5. LEGISLATURES—SESSIONS—SIXTY DAYS—REV. STATS. U. S., SEC. 1852, CONSTRUED—POWER TO APPROVE AND PASS BILLS THEREAFTER—CHEYNEY v. SMITH, 3 ARIZ. 143, 23 PAC. 680, EXPRESSLY OVERRULED.—Territorial legislatures are limited to sixty days' duration. Sec. 1852, *supra*, construed. Neither the governor nor legislature has any power to approve or pass bills thereafter. *Cheyney v. Smith*, *supra*, expressly overruled.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Millay & Bennett, for Appellant.

No bond on appeal is required to be given by a county in any case, for the reason that counties are integral portions of the territory and partake of all its privileges and immunities, and its government is a portion of the territorial government, and it is therefore exempted from the necessity of giving bond by the provisions of section 866 of the Revised Statutes, which provides that "The territory of Arizona shall not be required to give a bond on appeal or writ of error taken by it in any civil case."

"They [counties] are merely parts of the state government and partake of the state's immunity from liability." *Gilman v. County of Contra Costa*, 8 Cal. 52, 68 Am. Dec. 291.

They are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them." *Hamilton County v. Mighels*, 7 Ohio St. 109; *Fry v. County of Albemarle*, 86 Va. 195, 19 Am. St. Rep. 879, 9 S. E. 1004.

"A county government is a portion of the state government, . . . and when there is no remedy against the state there may be none against the county." *Hunsaker v. Borden*, 5 Cal. 290.

"The fact that a county has certain rights recognized in

law as its own does not sever it as a body from the state, and only distinguishes it in the state and as a part of it. . . . The institution of local subdivisions is merely a means of government, and counties and their officers are but parts of the machinery that constitute the public system." *Commonwealth v. Brice*, 22 Pa. St. 211, 60 Am. Dec. 79.

A general appearance in the appellate court and filing of briefs upon the merits confers jurisdiction, and is a waiver of the defect in the appeal by reason of lack of an appeal-bond, where such bond is required. *Dillingham v. Skein*, Hemp. 181; *Wenona Paper Co. v. First National Bank*, 33 Ill. App. 630.

There is no statute authorizing the county to pay the county recorder for recording tax-deeds. The act of 1889 entitled "An act to amend paragraph 2710 of the Revised Statutes" (one of the "Lost Laws") never became a law for the reason that it was not signed by the governor or returned to the legislature with his objections, nor did it remain in his hands ten days during the legal existence of the legislature. *Trammel v. Bradley*, 37 Ark. 374; *Treadway v. Schnauber*, 1 Dak. 249; *Territory ex rel. Haller v. Clayton*, 5 Utah. 598, 18 Pac. 628; *Territory v. Scott*, 3 Dak. 357, 20 N. W. 401; *Stephenson v. Moody*, 2 Idaho, 260, 12 Pac. 902; *State v. Arrington*, 18 Nev. 412, 4 Pac. 735; *Bank v. County of Yankton*, 101 U. S. 29; *Miners' Bank v. State of Iowa*, 12 How. 1.

Fitch & Campbell, for Appellee.

See brief of appellee in case of *Maricopa County v. Rosson*, *post*, p. 335.

HAWKINS, J.—Action by appellee to recover \$1,818.55. for services as county recorder in filing and recording certain tax-certificates and tax-deeds to lands that had been struck off to the territory for delinquent territorial and county taxes. Judgment was recovered for \$809.65 against appellant. Appellee moved to dismiss the appeal, for the reason the appellant filed no appeal-bond, as required by the statute. The statute does not say in direct terms that a county may appeal without giving bond to appellee. It does say that the territory may do so. Rev. Stats., par 866. A county is a political subdivision of the territory, and may sue and be sued. It does

not have to file an appeal-bond in order to maintain its appeal. The motion to dismiss is denied.

Appellee also raised the question that the motion for new trial was not embodied in a bill of exceptions, and the points therein contained cannot therefore be considered in this court. We think this point well taken, and we cannot consider any question in the case not apparent upon the face of the record. Upon this point this court has repeatedly so held. *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320; *Snead v. Tietjen*, 3 Ariz. 195, 24 Pac. 325; *Gila R. I. Co. v. Wolfley*, 3 Ariz. 176, 24 Pac. 257.

The only question for us to consider in this case is, Does the complaint state facts sufficient to constitute a cause of action? It does not. The county is not interested in the deeds and certificates filed and recorded by the appellee. They were made by the tax-collector under the law to the territory. It then became the duty of the county recorder (Rev. Stats., par. 2703) to record the deeds to the territory without charge to the county. Paragraph 2710 of the Revised Statutes provides the mode by which the county collector and the county recorder get their fees for the class of services sued on in the action at bar. There is no other. The board of supervisors (under paragraph 2709 of the Revised Statutes) become the agents of the territory in the disposition of all real estate held by the territory under the tax-deed for the collection of the total taxes, penalties, and costs, including the unpaid charges of the collector and recorder. When so collected by said board, the money is all paid by them to the county treasurer, and he (the county treasurer) first pays therefrom what is due the county collector and the county recorder, and distributes and credits the balance to the funds entitled thereto. It is readily seen that under no circumstances can the county be held for such fees of the collector and recorder.

Appellee in his complaint, however, claims that his fees became a county charge under paragraph 2710 of the Revised Statutes "as amended by the act of April 2, 1889." This act never became a law, for the reason that it was not signed by the governor; nor was it returned to the legislative assembly with his objections and passed over his veto; nor did it remain in his hands ten days during the existence of the legislature. The fifteenth legislative assembly of Arizona con-

vened on the twenty-first day of January, 1889. The sixty days' duration allotted it by Congress expired long before this act purports to take effect. Territorial legislatures are limited to sixty days' duration. Rev. Stats. U. S., sec. 1852. Neither the governor nor the legislature has any power to approve or pass bills thereafter. *Territory v. Clayton*, 5 Utah, 598, 18 Pac. 628. It is hardly necessary to cite authorities on this question. The mere reading of the act of Congress solves the same.

The judgment is reversed, with directions to the court below to sustain the demurrer to the complaint. The case of *Cheney v. Smith*, 3 Ariz. 143, 23 Pac. 680, is expressly overruled.

Baker, C. J., having been of counsel for appellee in the court below, took no part in the cause in this court.

Bethune, J., and Rouse, J., concur.

[Civil No. 426. Filed May 13, 1895.]

[40 Pac. 314.]

COUNTY OF MARICOPA, Defendant and Appellant, v. R.
L. ROSSON, Plaintiff and Appellee.

1. APPEAL AND ERROR—COUNTY—APPEAL-BOND.—Counties may appeal without filing appeal-bond.
2. SAME — BILL OF EXCEPTIONS — NECESSITY FOR — MOTION FOR NEW TRIAL.—Where a motion for a new trial is not embodied in a bill of exceptions this court can only consider errors upon the face of the record.
3. SAME—ERROR APPARENT ON THE FACE OF RECORD—JUDGMENT OVERRULING DEMURRER.—A judgment overruling a demurrer is a part of the record, and does not have to be excepted to or embodied in a bill of exceptions before it can be reviewed.
4. OFFICE AND OFFICERS — COUNTY TAX-COLLECTOR — FEES — EXECUTING TAX CERTIFICATES — ACKNOWLEDGMENTS — COUNTY CHARGE—STATUTORY FEES—REVENUE ACT.—A tax-collector cannot maintain an action against the county for fees for executing tax-certificates to the territory, nor for money paid for acknowledgments to tax-deeds to the territory. He accepts his office with the law as writ-

ten in the statutes, and can get such fees only by the mode set out in the Revenue Act.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Millay & Bennett, for Appellant.

See brief in *Maricopa County v. Osborn*, ante, p. 331.

Fitch & Campbell, for Appellee.

When a litigant is defeated in the lower court, the errors complained of by him, or the insufficiency of the evidence to sustain the judgment, cannot be considered in the appellate tribunal, unless a motion for a new trial is made below, and the court's attention called to the aforesaid errors and want of evidence for the purpose of allowing that court to correct itself.

The mere fact of making such motion in the lower court is not sufficient. It must be preserved in a bill of exceptions for review in the appellate court.

If the motion is not before the court in a proper manner, any error of law in the admission or rejection of evidence at the trial or insufficiency of the evidence to sustain the judgment at the trial cannot be considered.

The only way in which a motion for a new trial can be brought before this court for consideration is by way of a bill of exceptions. *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320; *Tietjen v. Snead*, 3 Ariz. 195, 24 Pac. 325; *Wolfley v. Gila River I. Co.*, 3 Ariz. 176, 24 Pac. 257; *Koons v. Phœnix M. Co.*, 3 Ariz. 204, 32 Pac. 266; *Smith v. McDonald*, 3 Ind. App. 49, 28 N. E. 994; *Springfield F. and M. Co. v. Newman*, 31 Ill. App. 393; *Perkins v. Barkow*, 39 Mo. App. 331; *Gong v. Robinson*, 31 Ill. App. 511; *Fuller v. Robinson*, 36 Mo. App. 105.

HAWKINS, J.—Action to recover fees claimed by appellee for executing certain tax-certificates to the territory, and for money paid for acknowledgments to certain tax-deeds to the territory. The court below rendered judgment for appellee

for \$292, being one dollar each for tax-certificates issued to the territory. We find practically the same kind of a record and about the same questions involved as in *Maricopa County v. Osborn*, ante, p. 331, 40 Pac. 313.

Counties may appeal without filing appeal-bond; hence the motion to dismiss the appeal is denied.

The motion for new trial not being here in a bill of exceptions, we can only consider errors upon the face of the record. The judgment overruling the demurrer is a part of the record, and does not have to be excepted to or embodied in a bill of exceptions before it can be reviewed here. *Hamlin v. Reynolds*, 22 Ill. 207. We have just decided in *Maricopa County v. Osborn* that a county recorder has no cause of action against the county for filing and recording tax-certificates and tax-deeds to the territory. He accepts his office with the law as written in the statutes, and can get such fees only by the mode set out in the revenue act. The tax-collector is in the same category. He has stated no cause of action in his complaint against the county.

The judgment is reversed and cause remanded, with directions to the court below to sustain the demurrer to the complaint.

Bethune J., and Rouse, J., concur.

Baker, C. J., took no part in this case, having been of counsel in the court below.

[Civil No. 457. Filed June 27, 1895.]

[40 Pac. 679.]

ALFRED C. SHEEN, Plaintiff and Appellant, v. FRED G. HUGHES, Clerk of the Board of Supervisors of Pima County, Arizona Territory, Defendant and Appellee.

1. ELECTIONS—PROCLAMATION—NECESSITY FOR—PURPOSE OF—NOTICE—POWER OF GOVERNOR TO DETERMINE OFFICERS TO BE ELECTED—"OFFICES TO BE FILLED" APPLIES PARTICULARLY TO SPECIAL ELECTIONS—CLERK—DUTY TO PLACE NAMES ON BALLOT—REV. STATS. ARIZ. 1887, PARS. 1588, 1589, 1590, 1591, CITED AND CONSTRUED.—Paragraph 1588, *supra*, provides that "there shall be held throughout the

territory upon the Tuesday after the first Monday in November, A. D. 1888, and every two years thereafter, an election for members of the legislative assembly and such other officers as may be required by law to be chosen at such election, to be called the 'general election.' " Paragraph 1589, *supra*, provides: "Special elections shall only be held to fill the vacancies in the office of members of the legislature or delegate to Congress, on the proclamation of the governor for that purpose." Paragraph 1590, *supra*, provides: "At least thirty days before a general election and at least ten days before any special election the governor must issue an election proclamation. . . ." Paragraph 1591, *supra*, provides: "Such proclamation must contain: (1) a statement of the time of the election and the offices to be filled. . . ." Under these statutes a proclamation of election is necessary for the holding of any election, and is for the purpose of giving notice of the time and place of holding the election. It is not in the power of the governor to authorize the election of an officer not provided for by law at a general election. The statute requiring "the offices to be filled" to be in the proclamation applies more particularly to the proclamations for special elections. The fact that the proclamation provided for the election of three members of the board of supervisors does not *of itself* make it the duty of the clerk of the board of supervisors to place upon the ballot the name of the third nominee, the election being a general election and the officers to be elected being determined by law.

2. OFFICE AND OFFICERS—VACANCY—APPOINTEE—UNEXPIRED TERM—REV. STATS. ARIZ. 1887, PAR. 3116, CONSTRUED.—Under the statute, *supra*, providing that the person appointed or elected to fill an office made vacant, after qualifying, possesses all the rights, etc., of the officer whose place he takes; he acquires the office for the remaining or unexpired portion of the term.
3. SAME—BOARD OF SUPERVISORS—FILLING VACANCIES—PERPETUATING TERM.—Provision having been made for the filling of vacancies in the entire board of supervisors, two of whom have terms not to exceed two years, and one having a term not to exceed four years, those whose duty it is to fill such vacancies must do so in a way that the terms of the former members of the board will be perpetuated for those terms, each term in the person of a certain individual.
4. SAME—VACANCY—APPOINTEE—ELECTION OF SUCCESSOR.—Where a vacancy in the office of supervisor has been filled by appointment there can be no election of a successor to such office until the expiration of the original term.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Affirmed.

Statement of facts by Rouse, J.

Appellant filed a complaint October 20, 1894, for a *mandamus* to compel appellee, as clerk of the board of supervisors, to place appellant's name on the ballots to be voted at the general election in 1894, as a candidate for the office of supervisor of Pima County. Plaintiff alleges in his said complaint that at the general election in 1890 Frank Allison was elected a supervisor of said county for a term of four years, ending January 1, 1895; that said Allison resigned December 7, 1891, and the remaining supervisors and the probate judge of said county filled the vacancy caused by Allison's resignation by the appointment of G. M. Avery, who duly qualified; that at the general election in 1892 M. G. Samaniego and Hiram Stevens were duly elected supervisors for terms commencing January 1, 1893,—Samaniego for two years, and Stevens for a term of four years, from that date,—and each duly qualified; that thereafter, on March 1, 1893, said Stevens departed this life, and the probate judge and remaining members of boards of supervisors filled the vacancy caused by Stevens's death by appointing James Finley a supervisor, and that Finley duly qualified; that the board of supervisors then consisted of Avery, Samaniego, and Finley; that the governor on September 24, 1894, by proclamation of election, ordered a general election to be held in the territory of Arizona, according to law, fixing the time for the election, specifying and enumerating the offices to be filled by election, and therein specifying and directing the election in Pima County of three members of the board of supervisors; that at the Democratic convention in Pima County held September 13, 1894, two candidates only for supervisors were nominated, and that they, with candidates named for other offices, were properly returned by said convention, to authorize their names to be placed on the ballots by the defendant; that the Democratic executive committee, which had been duly authorized by the said convention to fill vacancies or omissions occurring in the ticket, after the said proclamation,—viz., on October 15, 1894,—selected and nominated plaintiff as a candidate for supervisor, for a term of two years, from January 1, 1895, in the place and stead of said Finley, and thereafter reported said nomination and appointment of plaintiff to the

defendant, and demanded that he place the name of said Sheen on the ballots to be voted at said election, for the office of supervisor. Defendant refused to comply with the demand and request to place plaintiff's name on said ballots, and plaintiff filed said complaint for a *mandamus*, to which defendant made an answer in the nature of a demurrer, and, further, that there was no vacancy in the office of supervisor caused by Stevens's death; that Finley was filling said vacancy. On the trial, judgment was given refusing the writ of *mandamus*, and in favor of defendant, from which plaintiff appeals.

Heney & Ford, for Appellant.

The law especially enjoined upon defendant as clerk of the board of supervisors the duty of preparing and providing ballots containing name of plaintiff, and as defendant refused so to do, a writ of *mandamus* should have been granted to compel him to perform this duty. Rev. Stats. Ariz. 1887, pars. 1590, 1591, 2335, 2336; Act No. 64, 16 Leg. Assem.

James Finley having been appointed on March 1, 1893, to fill the vacancy caused by the death of Hiram Stevens, held only till the general election of 1894, and it was the duty of the defendant to provide ballots containing the name of plaintiff as a candidate to fill such vacancy. *Hagerty v. Arnold*, 15 Kan. 367; *Rice v. Stevens*, 25 Kan. 302; *Attorney-General v. Councilmen of Detroit*, 58 Mich. 213, 55 Am. Rep. 655, 24 N. W. 887; *Attorney-General ex rel. Lawrence v. Trombly*, 89 Mich. 50, 50 N. W. 744; *Tillson v. Ford*, 63 Cal. 701.

When the duration or term of an office to be filled by popular election is a question of doubt or uncertainty, the interpretation is to be followed which limits it to the shortest time and returns to the people at the earliest period the power and authority to refill it. *Wright v. Adams*, 45 Tex. 134; *People v. Fitch*, 1 Cal. 520.

Barnes & Martin, for Appellee.

In the absence of a statute or clause in the Organic Act limiting the holding of one inducted into an office to fill a vacancy, the law is, that such person holds during the unexpired term in which the vacancy occurred.

The incumbent then becomes seized of the office as a vested right. He has an estate in it as property of which he cannot be divested.

It is a contract between the territory on the one hand and the individual on the other, in the right and enjoyment of which he cannot be disturbed or defeated except by operation of law. *People v. Wells*, 2 Cal. 204; *United States v. Hartwell*, 6 Wall. 385.

One of these vested rights is to hold for the term (*People v. Rix*, 33 Cal. 503), and to receive the emoluments for the term.

Section 3116 of the Revised Statutes of Arizona is a legislative declaration of the common law as above stated.

ROUSE, J. (after stating the facts).—The first thing to claim our attention, presented by the record in this case, is the proclamation of election. Counsel for appellant contend that as it was stated in the proclamation of election that three supervisors were to be elected, it was the duty of appellee to place the names of the three persons nominated on the ballots as candidates for supervisors; that the proclamation, *per se*, fixed the number to be elected. It will only be necessary for us to consider a proclamation of election far enough to dispose of the above contention. We have the following statutes with reference to elections, viz.: “There shall be held throughout the territory, upon the Tuesday after the first Monday in November, A. D. 1888, and every two years thereafter, an election for members of the legislative assembly and such other officers as may be required by law to be chosen at such election, to be called the ‘general election.’” Rev. Stats., par. 1588. “Special elections shall only be held to fill the vacancies in the offices of members of the legislature or delegate to Congress, on the proclamation of the governor for that purpose.” Rev. Stats., par. 1589. Two kinds of elections have been established,—viz., general elections and special elections. Special elections can only be held to fill vacancies in the office of members of the legislature or delegate to Congress. No other officers can be chosen at such election, and they can only be held on the proclamation of the governor for that purpose. It is further provided by law as follows: “At least thirty days before a general election and at least ten

days before a special election the governor must issue an election proclamation. . . ." Rev. Stats., par. 1590. "Such proclamation must contain: (1) A statement of the time of election and the offices to be filled. . . ." Rev. Stats., par. 1591. A proclamation of election is necessary in order for the holding of any election. Par. 1590, *supra*. It is evident from the above provisions of the statute that proclamations of elections are for the purpose of giving notice of the time and place of holding the elections. Proclamations of elections, as a rule, are considered only as notices. McCrary on Elections, sec. 26, pp. 141-151. Mr. Cooley states the rule thus: "Where, by the express provisions of the statute, the election is to be held after proclamation or notice announcing the time or the place, or both, and where no such proclamation has been made or notice given, the election is void. But where both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty. The right to hold the election in such a case is derived from the law, and not from the notice." Cooley on Constitutional Limitations, 603. The statute provides for the holding of general elections, fixing the dates thereof, and what officers are to be elected at such elections. Par. 1588, *supra*. The law declares what officers are to be elected at general elections, and it is not in the power of the governor to authorize the election of an officer at such an election, unless there is such office provided by law, or to prevent the election of an officer at such election, to an office to be filled at that time, by including the office in his proclamation in the first case, and withholding it in the other. Cooley on Constitutional Limitations, 603; *Foster v. Scarff*, 15 Ohio St. 532; *Dishon v. Smith*, 10 Iowa, 212.

It is provided that special elections to fill vacancies occurring in certain offices may be held "on the proclamation of the governor for that purpose." General elections occur at fixed periods, and for the election of the officers to take the places of those whose terms expire by operation of law. Special elections are held for the election of officers to places made vacant by the occurrence of some unexpected event,—something which may occur without becoming generally

known. For these reasons, notices of special elections should be given of the time, and also the purpose thereof should be stated. It is apparent that the statute requiring the words "the offices to be filled," to be in the proclamation applies more particularly to the proclamations of election for special elections. The proclamation of election in this case, *per se*, did not make it the duty of appellee to place on the ballots the name of appellant. The election was a general election, and only such officers as were provided by law could be elected at that time. The proclamation of election was only a notice of the time of such election. As this is not a contest for an office, it is not necessary that we should dwell upon this point any longer.

The only other question presented by the record is as to the length of time for which Finley was appointed. "An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. . . ." Rev. Stats., par. 3111. It is the term that becomes vacant. *Id.* "Any person elected or appointed to fill a vacancy, after filing his official oath and bond, where a bond is required, possesses all the rights and powers and is subject to all the liabilities, duties, and obligations of the officer whose vacancy he fills." Rev. Stats., par. 3116. The person appointed to fill an office made vacant, after qualifying, possesses all the rights, etc., of the officer whose place he takes. That which is surrendered by the one is gained or acquired by the other. The one loses the office for the remaining or unexpired portion of the term, and the other acquires, by appointment, that which is surrendered. When an office becomes vacant, and there is no mode provided by the law to fill the vacancy, the governor is to fill it by granting a commission. Rev. Stats., par. 3114. A mode for filling vacancies in the board of supervisors is provided in paragraph 388 of the Revised Statutes. Such vacancies are filled by the remaining supervisors and the probate judge, and if there are no supervisors, then by the probate judge, recorder, and treasurer of the county. The law provides for three supervisors, two of whom are elected for terms of two years, and one for a term of four years, all being elected at the first election, and the long, or four-years, term being acquired by the candidate receiving the greatest number of votes. Pro-

visions have been made for filling vacancies in the entire board of supervisors, two of whom have terms not to exceed two years, and one having a term not to exceed four years. It follows from the above that those whose duty it is to fill such vacancies must do so in a way that the terms of the former members of the board will be perpetuated for those terms, each term in the person of a certain individual. Otherwise it would result in confusion, and there would be no way to determine the time of the expiration of the terms of the individuals appointed.

We are of the opinion that on the death of Stevens a vacancy in the office of supervisor occurred for the remaining portion of his term,—viz., from March 1, 1893, until January 1, 1897; that the appointment of Finley was for the term made vacant by Stevens's death; and that no election of a successor of Finley can be had until the general election in 1896. The act of defendant in refusing to place plaintiff's name on the ballots was right, and the judgment of the district court in favor of defendant is correct, and is affirmed.

Baker, C. J., and Hawkins, J., concur.

[Criminal No. 104. Filed October 8, 1895.]

[42 Pac. 111.]

FELIX BUSTEMENTE, Defendant and Appellant, v.
UNITED STATES OF AMERICA, Plaintiff and Respondent.

1. **PUBLIC LANDS—TIMBER—MESQUITE—REV. STATS. U. S., SEC. 2461, CONSTRUED.**—Mesquite, a shrub or small tree, indigenous to the deserts, good only for firewood, and used in the manufacture of no useful article, is not "timber," within the meaning of the statute, *supra*.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Reversed.

Statement of facts by Hawkins, J.

Appellant was indicted, tried, and convicted of the crime of unlawfully cutting and removing from the public lands of the United States "five cords of mesquite cordwood" for a purpose other than for the use of the navy of the United States, said public lands of the United States being non-mineral.

Barnes & Martin, for Appellant.

E. E. Ellinwood, United States Attorney, for Respondent.

HAWKINS, J.—The only question in this case is whether mesquite is "timber," within the meaning of section 2461 of the Revised Statutes of the United States. Mesquite is a shrub or small tree, indigenous to the deserts. In *United States v. Stores*, 14 Fed. 824, Locke, J., in charging the jury, says: "The term 'timber,' as used in commerce, refers generally only to large sticks of wood squared, or capable of being squared, for building houses or vessels." Again, we find: "As a generic term, it [timber] properly signifies only such trees as are used in building ships or dwellings." *United States v. Schuler*, 6 McLean, 28, Fed. Cas. No. 16,234. These definitions of "timber," as well as those given by the various lexicographers, show us that it includes all kinds of wood used in the manufacture or construction of useful articles. It is a matter of common knowledge that mesquite is a brittle, knotty, scraggy, fiberless, gnarled wood, and can only be used for firewood; it is used in the manufacture of no useful article; it only inhabits the desert; its removal from such land does not depreciate the value of the land to the government; that, if the desert lands of the government are ever to be reclaimed, the mesquite growth has to be removed. Neither a ship-carpenter, molder, cabinetmaker, lastmaker, carriage-builder, nor any other kind of woodworker, would include mesquite in their several classifications of timber. Such being true, what did Congress understand by the term when it passed the act in question? It mentions particularly live oak, red cedar, and speaks of other timber. Conceding that it was the intention of Congress to apply the term in its most general sense, as the cutting and removing of mesquite from the deserts in no wise injures the government, and gives some pio-

neer an occupation, keeping some lone quartz-mill running, and it would otherwise destroy a valuable industry, I am compelled to hold that Congress did not intend to include mesquite in the term "timber" when it passed said law, and so declare the law to be that mesquite is not "timber," within the meaning of said section 2461 of the Revised Statutes of the United States; and I am of opinion that the court below erred in not sustaining the demurrer to the indictment. The judgment is reversed, and the cause remanded.

Baker, C. J., concurs.

ROUSE, J.—I concur in the result. Appellant was accused, by the indictment, of the crime of cutting "five cords of mesquite cordwood." I do not think a crime was alleged in the indictment. The indictment was based on section 2461 of the Revised Statutes of the United States. That section makes it a crime to cut, etc., "timber." I hold that mesquite must be determined to be timber, or not, by its character, growth, fiber, and the uses to which it may be put, in being material of which useful articles can be made.

[Civil No. 481. Filed November 16, 1895.]

[42 Pac. 483.]

A. J. CHANDLER et al., Defendants and Appellants, v.
FRANK B. AUSTIN et al., Plaintiffs and Appellees.

1. WATER AND WATER-RIGHTS—COMMON LAW—INAPPLICABILITY.—The common law has no application whatever to the use of water and can furnish no aid in the adjustment of water-rights in this territory.
2. SAME—SAME—RIPARIAN RIGHTS—REPUDIATED BY REV. STATS. ARIZ. 1887, PAR. 3198.—The common-law doctrine of a riparian right is expressly repudiated by statute, *supra*.
3. SAME—DIVERSION—RIGHT TO HAVE WATER DELIVERED IN RIVER AT HEAD OF DITCH.—Appellees, prior appropriators of water for irrigation and milling purposes, are not entitled to an injunction restraining appellants, subsequent appropriators for power purposes, from diverting water appropriated by appellees further up the

stream, except for mechanical purposes, and compelling appellants, after such use, to return it to the natural channel above the appellees' point of diversion, where it appears that appellants are returning such water to appellees' ditch above the point of any use by appellees.

4. SAME—APPROPRIATION—DELIVERY AT CERTAIN POINT—DAMAGE.—A person entitled to the use of a certain quantity of water is not entitled to receive such water at one place instead of another, provided his rights are in no way affected.
5. SAME—SAME—INTERFERENCE—REMEDIES—DAMAGES—INJUNCTION.—Improper use of water by appellants, or failure to deliver back the proper amount, affords an action at law for damages, and not ground for an injunction.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

The facts are stated in the opinion.

John D. Pope, C. F. Ainsworth, and Pierce Evans, for Appellants.

It is conceded that the first appropriator of water is "entitled to the exclusive use of the water up to the amount embraced in his appropriation." Black's Pomeroy on Water-Rights, sec. 60; Kinney on Irrigation, sec. 173.

The second appropriator can take out the water above as well as below the first appropriator, and can use it for any lawful purpose. The limit, and the only limit, which the law places upon the exercise of this right is, that he must not substantially interfere with the use of the water by the first appropriator to the extent of his appropriation. Kinney on Irrigation, sec. 175; Black's Pomeroy on Water-Rights, sec. 80; *Butte etc. Co. v. Vaughn*, 11 Cal. 143; *Hill v. Smith*, 27 Cal. 476; *Nevada Water Co. v. Powell*, 34 Cal. 119, 91 Am. Dec. 685; *Atchison v. Peterson*, 29 Wall. 507.

It follows from the foregoing propositions that a second appropriator may take the water out of the stream above the head of the first appropriator's ditch, and may make any use of the water which does not substantially interfere with the prior right of use under the first appropriation, and may return the water either into the channel of the stream above the head of the first appropriator or at any point in the canal of

the first appropriator that will enable him to use the water to the same extent as if it flowed into the head of his canal. *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; Black's Pomeroy on Water-Rights, sec. 72; Kinney on Irrigation, sec. 181; *Mason v. Cotton*, 4 Fed. 792.

If it were conceded that the turning of the water back below the head of the Tempe Canal, but above the place of the use, was a technical violation of the rights of the first appropriators, still an injunction ought not to have been granted, because,—1. The damage, if appreciable in amount, could easily have been compensated by the awarding of damages, and if the amount was not appreciable, nominal damages would have been sufficient; and 2. It was not made to appear, and no evidence was offered to show, that defendants were not able to respond in damages. Kinney on Irrigation, sec. 332; Black's Pomeroy on Water-Rights, sec. 75; *Atchison v. Peterson*, 20 Wall. 507; *Mason v. Cotton*, 4 Fed. 792; *Waldron v. Marsh*, 5 Cal. 119; *Butte etc. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *McDonald v. Water Co.*, 13 Cal. 239; *Slade v. Sullivan*, 17 Cal. 102; *Real Del Monte M. Co. v. Pond M. Co.*, 23 Cal. 83; *Hill v. Smith*, 27 Cal. 483; *Hewett v. Story*, 64 Fed. 520; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Sharp v. Hoffman*, 79 Cal. 406, 21 Pac. 846; *Bigelow v. City of Los Angeles*, 85 Cal. 614, 24 Pac. 778; *Peregoy v. McKissic*, 79 Cal. 572, 21 Pac. 967; *Modoc etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Chesapeake etc. R. R. Co. v. Bobbett*, 5 W. Va. 138.

Kibbey & Williams, for Appellee.

“Although, as we have seen in a previous section, the appropriator has no property in the water of the stream flowing in its natural channel above the head of his canal,—the point of diversion,—yet, by virtue of his prior appropriation, he acquires a most important legal and equitable right over or with respect to such water. The right of the prior appropriator to have the water to continue to flow in its usual manner through its natural channel or bed down to the head of his ditch—the point of diversion, where his own actual property rights in and to the same commence—to the extent of his appropriation, without diversion or interruption by others claiming subsequent to him, is an incorporeal hereditament

appurtenant to the ditch and coextensive with the appropriator's right to the ditch itself. He has the right to insist that the water continue to flow as it did when he first made the appropriation. A mere temporary or trivial irregularity in the flow of the water in the stream such as does not cause actual injury to the prior appropriator will not be actionable; but if a sensible or positive injury is caused, such as would interfere with the water-right of the appropriator, an action will lie, not only to recover damages, but also to enjoin the future commission of the wrong. The first appropriator of the waters of the stream passing through the public lands has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation." Black's Pomeroy on Water-Rights, sec. 64.

"The diversion of the water of a stream is a private nuisance to the prior appropriator, who is injured thereby, and he can maintain an action for such nuisance. For a past diversion the only remedy is a recovery for damages; but when the diversion is continuing, equity will interfere by injunction. It seems the injured party may himself abate the nuisance." Citing *Butte T. M. Co. v. Morgan*, 19 Cal. 609. See Black's Pomeroy on Water-Rights, secs. 72-75; Kinney on Irrigation, secs. 320-337.

BETHUNE, J.—The plaintiffs, who are the appellees here, are the prior appropriators and users, as between themselves and appellants, of certain water of the Salt River, and conduct their water through what is known as the "Tempe Canal" to the various points of use. Their appropriation and use of said water are for the purposes of irrigation and turning a gristmill known as "Hayden's Mill." Appellants, having appropriated and otherwise secured the use of water from the river subsequent to the appropriation of appellees, at a point in the river several miles above the point of diversion of appellees, for the purpose, among other things, of "creating, generating, and perpetuating, for public and private use, a water-power of not less than eight hundred horsepower," now seek to mingle the water of appellees with their own, and run it from the river through their canal, over a precipice having a fall of forty or fifty feet, where the power plant is located, and deliver it back to appellees at a

point in appellees' ditch above any place of use by appellees, and were so actually running and delivering said water when this action was commenced. An injunction was issued by the lower court, and, upon the final hearing of the case, made perpetual, restraining appellants from interfering with the water of appellees, except to use it for mechanical purposes, provided that said water should after such use be returned by appellants to the natural channel of the river above the mouth of appellees' ditch. This requirement, so far as we are aware, is in strict conformity with the provisions of the common law. At common law probably no such thing as an irrigating ditch was known. Under its provision the usufruct is the only extent of a claim in water. The maxim "Water should, and by right ought to, flow where it has been accustomed to flow" expresses the spirit of the common law in regulating the use of water; so that the doctrine that water, after being used by any person to the extent permitted by the common law, must be returned to its original channel not perceptibly diminished in quantity and undeteriorated in quality was established. But the common law has no application whatever to the use of water with us. Not even the common-law doctrine of a riparian right is acknowledged by us, but is expressly repudiated by section 3198 of the Revised Statutes. So the common law can furnish no aid in the adjustment of water-rights in this territory. It seems to be admitted that there could be no objection to the use by a subsequent appropriator of the waters of a stream already appropriated, should the water be returned uninjured to the channel above the point of diversion of the prior appropriation. But, as we have seen, this rule springs from the common law, which, as already stated, has no application in regulating our water-rights. We cannot perceive any reason why, under our system of the use of water, a person entitled to the use of a certain quantity of it should receive it at one place instead of another, provided his rights are in no way affected or curtailed. The appellees claim a certain quantity of water for the irrigation of their lands and to run Hayden's Mill. If they get it, why should the manner in which they get it matter to them, especially when one way may add useless burdens upon the exercise of absolute rights of the appellants, and either way would equally subserve the rights of appellees?

In our view of the case, no rights of appellees are invaded by reason of the delivery of the water claimed by them into their ditch above the point of use by them. The evidence fails to show that any damage has accrued, or will accrue, to them by having their water delivered to them at the point to which appellants were delivering it at the commencement of this action, or that their remedies against appellants for a failure to so deliver the quantity of water to which appellees are entitled, or for any damages otherwise suffered, would be in any manner different from those appellees would have should appellants be required to deliver the proper quantity back into the channel of the river. We are of the opinion that the appellants were exercising an absolute right in the use of the water, of course subject to any penalty they may incur by the abuse of such right. We therefore do not think this is a case for an injunction, but that the appellees have ample modes of redress at law for any damages which may be occasioned by any improper action of appellants in the use of the water, or in delivering it back to appellees.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

Hawkins, J., concurs.

Rouse, J., concurs in the result.

[Civil No. 453. Filed December 4, 1895.]

[42 Pac. 619.]

LIONEL M. JACOBS, Plaintiff and Appellant, v. OSCAR BUCKALEW, Defendant and Appellee.

1. TAXES AND TAXATION — SALE — COLLECTOR'S DUTY TO DESIGNATE SMALLEST PORTION—REV. STATS. ARIZ. 1887, PAR. 2694, MANDATORY. —The statute, *supra*, providing that the owner of property offered for sale for taxes may designate in writing what portion of the property he wishes sold, if less than the whole, but if he does not, then the collector *may* designate it, and the person who will take the least quantity and pay the taxes shall be declared the purchaser, is mandatory, and upon a sale for taxes, the owner not having

designated the portion he wishes sold, it is the duty of the tax-collector to designate and offer for sale the smallest portion of the property for the purpose of raising the amount due for the taxes thereon.

BAKER, C. J., dissenting.

2. SAME—SAME—REV. STATS. ARIZ. 1887, PAR. 2694—DESIGNATION BY COLLECTOR—SUFFICIENCY—VALIDITY.—On a sale of property for taxes under statute, *supra*, an inquiry by the collector, "Who will take the lowest portion or quantity of block 184 and improvements and pay the taxes and costs due?" is not such a designation as is required by the statute, and a tax-deed based on such sale is void.

BAKER, C. J., dissenting.

3. SAME—ASSESSMENT—BUILDINGS JOINED AND APPARENTLY ONE PROPERLY ASSESSED AS A BLOCK.—A block all belonging to one person and covered by buildings so joined together as to have the appearance of one building, is properly assessed as a block.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

S. M. Franklin, for Appellant.

Barnes & Martin, for Appellee.

The statute requires certain things to be done at the sale. One is, the owner may designate in writing before the sale what portion of the property he wishes sold if less than the whole, but if the owner does not, then the collector may designate it, and the person who will take the least quantity of the property and pay the taxes and costs due shall be declared the purchaser.

In this case the owner did not so designate, and it was therefore the duty of the officer to make the designation of what part less than the whole he would sell.

This duty was mandatory, and if he fail so to do the sale is void.

In *French v. Edwards*, 13 Wall. 506, where a like statute in California was before the court, it was held: "That what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory

merely.” Citing *Clark v. Crane*, 5 Mich. 154, 71 Am. Dec. 776; *Ainsworth v. Dean*, 21 N. H. 400; *Loomis v. Paigree*, 43 Me. 311; *Stead’s Ex. v. Course*, 4 Cranch, 403; Black on Tax-Titles, p. 286; Sedgwick on Statutory and Constitutional Law, pp. 368-378; Cooley on Constitutional Limitations, pp. 74-78.

“When the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed, or the acts done will be invalid.” *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528; *Clark v. Rowan*, 53 Ala. 400; *Straw v. Poor*, 74 Me. 53.

ROUSE, J.—This is an action in ejectment for block 184 in the city of Tucson, Pima County, Arizona. Buckalew was the owner of said block 184. Said block was a square, bounded by streets on all sides, and covered with buildings fronting on the several streets, so built as to make them in appearance one building. The buildings in fact were separate houses joined together, and occupied by different families as dwellings. The whole block was assessed as one piece, and valued for that purpose at five thousand dollars. Buckalew failing to pay the taxes on said block, it became delinquent, and was advertised and sold for the taxes due for the year 1891, and was also advertised and sold for the taxes due for the year 1892. Plaintiff purchased said block at both of said sales, and deeds were executed and delivered to him by the tax-collector, conveying to him said block, and these deeds are the evidences of title relied upon by plaintiff in this action. The assessment and judgment for the taxes due upon said property were regular. The only question presented by the record in this case for our consideration is as to the duty of a tax-collector in the sale of property for delinquent taxes. Paragraph 2694 of the Revised Statutes of Arizona is as follows: “The owner or person in possession of any property offered for sale for taxes due thereon, may designate in writing to the county collector, prior to the sale, what portion of the property he wishes sold, if less than the whole, but if the owner or possessor does not, then the collector may designate it, and the person who will take the least quantity of the

property, or in case an individual interest is assessed, then the smallest portion of the interest, and pay the taxes and costs due, including one dollar for the duplicate certificate of sale to the purchaser, and the county recorder's fees for filing same in his office, shall be declared the purchaser. But in case there is no purchaser in good faith for the same as provided in this section, the whole amount of the property assessed shall be struck off to the territory as the purchaser and the certificate delivered to the county treasurer and filed by him in his office. . . .” The defendant, prior to the sale, did not designate what part of said property he wished sold for the taxes due thereon, in writing, or in any manner whatsoever. In fact it does not appear from the record in this case that he was even present at said sale. The tax-collector simply read the advertisement of property which was delinquent, as shown by the advertisement, and made the proclamation that he would sell the said property for the taxes due thereon; and in said advertisement the property in controversy was embraced. The tax-collector did not designate any portion of the property in controversy that he would sell, less than the whole, in any other manner than as follows: “Oscar Buckalew, block 184, and improvements, in Tucson, territorial and county taxes, \$181.50; city taxes, \$57.75; costs, \$1.00. Who will take the lowest portion or quantity of said block 184 and improvements, and pay the taxes and costs due? . . .” There being no offer or any response by any one to said question, said collector again exclaimed: “Who will take all of said block 184 and improvements, and pay said taxes and costs? . . .” Thereupon the plaintiff, Lionel M. Jacobs, said: “I will take all of said block 184 and improvements, and pay said taxes and costs.” And thereupon said collector announced that said Jacobs would take said block, and pay the taxes and costs, and he then publicly inquired: “Will any person take a less quantity of said block, and pay the taxes and costs?” No response being made to this inquiry, said collector struck off and sold to said Jacobs the whole of said block 184, and delivered to him a certificate of sale as the purchaser thereof; and thereafter deeds for said block were executed and delivered to said Jacobs, and they are the deeds on which plaintiff's right of recovery in this action is based. We are not advised by the record as to whether the said block

184 was subdivided into lots or not. It all belonged to defendant, and was covered by buildings so joined together as to have the appearance of one building. An assessment of it as a block was proper. *Weaver v. Grant*, 39 Iowa, 294; *Kregelo v. Flint*, 25 Kan. 695; *Wyman v. Baer*, 46 Mich. 418, 9 N. W. 455; *People v. Culverwell*, 44 Cal. 620; Rev. Stats. Ariz., par. 2642. Notwithstanding the description of the property in the assessment, and notwithstanding the fact that the owner of the property had made no designation of the part of the property he wished sold for the taxes, it was the tax-collector's duty to designate and offer for sale the smallest portion thereof for the purpose of raising the amount due for the taxes thereon. *French v. Edwards*, 13 Wall. 506; *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528. The provisions of paragraph 2694 of the Revised Statutes of Arizona as to the duties of the tax-collector are mandatory, and, said collector having failed to comply with the provisions thereof in the sale of said property, the deeds executed and delivered therefor to plaintiff were void, and the judgment of the district court is affirmed.

Hawkins, J., concurs.

BAKER, C. J.—I dissent. After reading the notice of sale containing a description of the property, the name of the owner, and the amount of the taxes and costs due, the tax-collector thrice proclaimed to the bidders present: "Who will take the least portion or quantity of said block 184 and improvements, and pay the taxes and costs?" There was no response. He then offered the whole of the tract, and said: "Who will take all of said block 184 and improvements, and pay said taxes and costs?" To this the appellant responded that he would do so. Thereupon the tax-collector proclaimed to the bidders: "Lionel Jacobs [the appellant] offers to take all of said block 184 and improvements, and pay the taxes and costs. Will any person take a less quantity, and pay said taxes and costs?" There being no response, the property was sold to the appellant. These are the undisputed facts of the case. This was a compliance with the statute. But the majority opinion holds that the statute is mandatory; that the officer was bound to designate some portion of the tract,

less than the whole, and offer it for sale first. The statute declares: "The owner or person in possession of any property for sale for taxes due thereon, may designate in writing to the county collector, prior to the sale, what portion of the property he wishes sold, if less than the whole, but if the owner or possessor does not, then the collector may designate it," etc. Rev. Stats. Ariz., par. 2694. These terms do not imply an absolute mandate. They leave to the officer the exercise of a sound discretion. The owner may, and, if he fails, the officer may or may not, make the designation, as he deems best. This very statute was taken from the Political Code of California, and a similar construction was put upon it by the highest tribunal in that state. The statute in force at the time the sale mentioned in *Roberts v. Chan Tin Pen*, 23 Cal. 263, was made provided that, "in case the owner did not designate the part to be sold, then the tax-collector 'shall' designate; while the present statute provides that he 'may' designate. As this change was made by amendment, it may fairly be said that it was the intention of the legislature to leave it to the discretion of the tax-collector to offer part or the whole of the property, as he might think best." *Hewes v. McLellan*, 80 Cal. 393, 22 Pac. 287. Where a state adopts the statute of another state, the construction of it by the highest court of that state is entitled to great weight. *McIntyre v. Kamm*, 12 Or. 253, 7 Pac. 27. It cannot be said to be the intention of the statute to require a vain or useless thing to be done. Here the officer diligently inquired if any bidder present would take less than the whole tract, and pay the taxes and costs, and none answered. To still require the officer to designate a less quantity than the whole, and offer it for sale first, is to demand the doing of a vain thing. There were no bidders for a less quantity. That was definitely ascertained, and hence it was useless to make the designation. The cases cited do not support the majority opinion. In *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528, the court, in reciting the facts upon which the case was decided, said: "The evidence shows that no offer of sale of a less quantity than the whole tract was made; that no proposition was made to those present at the time of the sale to know if any of them would take a portion," etc. Is that this case? Besides, the statute in Missouri is essentially different from ours: "The

person who offers to pay the amount of taxes, special assessments, interest, and costs due on any tract or parcel of real property for the smallest portion of the same, is to be considered the purchaser. . . . The person who will pay the taxes, the special assessments, interest, and costs for the least number of front feet or inches of any lot or parcel of real property, to be taken from either side thereof, the side to be designated by the bidder at the time he offers his bid, shall be deemed the purchaser for the smallest portion of such lot or parcel of real property. . . . If no person bid for a less quantity than the whole of a lot or parcel of real property, the city collector shall sell the lot or parcel of real property to any person who will take the whole of such tract, lot, or parcel of real property and pay the taxes, special assessments, interest, and costs." Rev. Stats. Mo. 1889, pars. 1354, 1355; *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528. At a glance it will be seen that the provision existing in our statute for the designation for a less quantity than the whole by the owner or officer is not found in these Missouri statutes, and therefore the predominating question for decision in this case does not arise under them, and *Roth v. Gabbert*, *supra*, has no application. And the same is true of the statutes under which the following case of *French v. Edwards* was decided. In *French v. Edwards*, 13 Wall. 506, there was no proposition put to the bidders to see if any one would take a less portion, and pay the taxes. No such opportunity was given to the bidders. The court said: "The deed of the sheriff does not show a compliance, in the sale of the property, with the requirements of the statute mentioned. It does not show that the smallest quantity of the property was sold for which the purchaser would pay the judgment and costs, or that any less than the whole was offered to bidders, or that an opportunity was offered to take any less than the entire tract, and pay the judgment and costs." Is that this case? Furthermore, that case was decided under an imperative statute, totally different from ours. There the law was that the officer "shall only sell the smallest quantity that any purchaser will take and pay the judgment and costs." "No more of the property shall be sold than is necessary to pay the judgment and costs." *French v. Edwards*, *supra*. It is plain to be seen that under such statutes the question involved in this case

could not arise. The cases cited were decided upon imperative statutes materially different from the one under consideration, and upon a state of facts other than, and in the main opposed to, the facts here. The deed in this case was, in my opinion, valid, and should have been sustained. I do not think we are called upon to disregard the plain intention of this statute in order to overthrow the title, simply because it arises from a tax-sale. If the courts of this territory desire to insure the payment of just taxes, they must commence to enforce the plain provisions of the law for the sale of land for taxes. These laws are stringent, and their terms indicate the legislative intention to meet a spirit of refinement in their interpretation which, in the past, has tended to render them inoperative.

[Civil No. 391. Filed December 23, 1895.]

[42 Pac. 949.]

MARY J. SMITH, Plaintiff and Appellant, v. J. K. BROWN,
Defendant and Appellee.

1. **ESTOPPEL — EXEMPTION — PARTNERSHIP — EVIDENCE.**—Evidence that the business of plaintiff, a married woman, and the head of a family, was conducted under the name of Mrs. M. J. Smith & Co.; that a son about twenty-one years of age worked in her store; that in conversation with creditors in purchasing goods, they used the plural pronoun "we"; also directed the goods shipped "to M. J. Smith & Co."; also that the son stated to one of them: "We wish you to ship the goods immediately. We want them as soon as possible"; also that one of the creditors asked plaintiff the question, "Who are your partners?" and she answered, "My creditors are my partners"; and the question, "Why do you do business in that name?" to which she answered, in effect, "That is my business," is insufficient to estop plaintiff from proving the business was not that of a partnership and claiming her rights of exemption.

BAKER, C. J., dissenting.

2. **SAME—PARTNERSHIP—BELIEF INDUCED BY REPRESENTATIONS.**—Unless the creditors thought they were dealing with a partnership, and were induced to so believe by the conduct of plaintiff, and that plaintiff's said action was for the purpose of inducing them to

believe that as a fact, plaintiff is not estopped to claim the business as her sole property.

8. SAME—REGARDED WITH DISFAVOR.—The law does not favor estoppels, because they operate to shut out the truth and prevent parties from asserting or defending their rights by proof of actual existing facts.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Charles Weston Wright, for Appellant.

“The law does not favor estoppels, because they operate to shut out the truth and prevent parties from asserting or defending their rights by proof of actual existing facts. They are therefore confined within very narrow limits, and are always required to be strictly made out.” *Plummer v. Lord*, 9 Allen, 458; *Andrews v. Lyons*, 11 Allen, 349.

“Where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.” Bigelow on Estoppel, p. 560.

To bring a case within this rule it must contain all the essentials of the rule; and these are: 1. By act or word one must willfully cause another to believe; 2. One must induce another to act on such belief; and 3. In so acting one must alter his previous position to his disadvantage.

The word *willfully* is not used in the sense of *malo animo*, or with intent to defraud or deceive, “but so far willfully that the party making the representation on which the other acts means it to be acted on in that way.” Bigelow on Estoppel, p. 640, n. 3.

No presumption, either of fact or of law, can be harvested from the use of a firm name. Thousands of single individuals, as we all know, are doing business under firm names. *Robinson v. Magarity*, 28 Ill. 426.

Why did not these sellers ask the question whether there was a partnership or not? Why did they not ask, if there was one, who composed it? By virtue of what did they

assume, if they did assume, that there was a copartnership, when this thought, at the time of the sale, was not in the minds of either? Was it permissible for them to assume, in the absence of any express representation of the fact, when the law required a public record of the fact, if it was a fact, and this they could have consulted? Rev. Stats., par. 2403; *Kingman v. Graham*, 51 Wis. 245, 8 N. W. 181; *Brant v. V. C. and I. Co.*, 93 U. S. 334; *Burges v. Seligman*, 107 U. S. 28, 2 Sup. Ct. Rep. 10; *David v. Park*, 103 Mass. 502.

Maxwell & Satterwhite, for Appellee.

ROUSE, J.—This is an action by plaintiff against defendant for damages for personal property of plaintiff seized and carried away by defendant. The complaint is as follows: “(2) That plaintiff was during all the times hereinafter stated, and now is, the member and head of a family, residing in said county. That the task of supporting and providing for said family devolved upon plaintiff during all of said times, and to that end and for that purpose, during all of said times, she carried on, under the name and style of Mrs. Mary J. Smith & Co., the business of buying, selling, repairing, and making household goods. That she was the sole owner of said business, of said goods, and each and all thereof, that she kept in stock and for sale. And that she alone had sole control and management of said goods, and of the management of said business. (3) That the total value of said goods, together with all other personal property, and all other kinds of property, owned by her during all of said times, was of the value of less than one thousand dollars. (4) That during the time she was transacting said business, and the time hereinafter mentioned, to wit, during the months of May and July, 1891, defendant, acting as the sheriff of said county, levied on said goods and personal property by virtue of a certain execution then in his hands. That defendant did, while so acting as such sheriff, and claiming then and there to act by virtue and in pursuance of said execution, seize, take into his possession, carry away, and convert and sell the said goods of the plaintiff, to wit, certain household furniture, then and there being the sole property of the plaintiff, and then and there being of the value of five hun-

dred and sixty-eight dollars and ninety cents. (5) That at the time said seizure was made by defendant, as aforesaid, of said personal property, plaintiff was present, and notified defendant that the total value of all personal property then owned by her was less than one thousand dollars; that the same, and all thereof, was exempt from levy and forced sale; and that she claimed such exemption. That it was the duty of defendant, upon plaintiff claiming said property, and each and all thereof, exempt from levy and forced sale, and claiming her right of exemption, as the head of said family, as her personal right, to have appraised the value of said personal property with plaintiff, and, in the event of their failing to agree upon the value of said property, then and in that event to have summoned appraisers to value the same, and all thereof, and to designate the property that was exempt. But the defendant, not regarding his duty in that behalf, refused to join with plaintiff in the appraisal of said property, or any thereof, and refused to join with plaintiff in the appointment of appraisers to value said property, and to designate that which was exempt, as aforesaid, from levy and forced sale, and defendant, wholly disregarding the rights of plaintiff in that behalf, and against her wish and protest, seized said property, carried the same away, and sold it at public vendue, whereby said property and all thereof became and was wholly and forever lost to plaintiff. Wherefore plaintiff demands judgment. . . ." Defendant pleaded a general denial, and the trial was had on the issues presented by said pleadings.

On the trial, the evidence tended to prove that plaintiff carried on business in Tucson, Pima County, Arizona, in the name of Mrs. M. J. Smith & Co.; that she was a sole trader, and filed her declaration as such in 1892; that she had a number of children, who lived with her, and were supported by her; that she had a son about twenty-one or twenty-two years old, who remained with her and worked in her store or place of business; that her business was that of dealing in new and second-hand household and kitchen furniture, and in repairing such goods; that all of her property, including the stock in hand, was of the value less than one thousand dollars; that, of said goods, defendant seized and carried away and sold \$568.90; that at the time defendant seized the

said property he was sheriff of said county of Pima, and seized the said property as such; that at the time the property was seized plaintiff requested defendant to set off her said property as exempt from execution, and to do and perform the acts required by law to be done in that respect; and that defendant failed and refused to set off any other part of said property as exempt, and made no disposition of plaintiff's property under the provisions of the statute on exemptions.

In justification defendant offered in evidence two executions, issued by one W. H. Culver, a justice of the peace, on judgments rendered by him,—one in the case of Kostuba, and the other in favor of Conrads Chair Company. Both of said parties were doing business in St. Louis, Missouri, and said suits were against M. J. Smith & Co. The summons in each case, as we are advised, was against the said defendant, M. J. Smith & Co., and the returns did not show that they had been served on any individual. The said judgments were by default. Defendant was permitted to introduce evidence on the trial to show that the salesmen, commonly called "drummers," who represented said judgment creditors, and who sold the bills of goods to plaintiff which were the foundation for said suits, had conversations with plaintiff and one of her sons at the time they made said sales, in which conversations plaintiff and her said son made certain declarations which are claimed to be sufficient to estop plaintiff from claiming said goods to be her individual property, but which made it the property of a partnership. Without expressing an opinion from which it may be concluded that, under the answer in the case, such a defense can properly be made, we have to state that the evidence on that point only tends to show that in conversation with the representatives of said creditors, when the class of goods to be purchased was discussed by plaintiff and her said son, they used the plural pronoun "we"; also, that, when asked by one of said representatives how they wished the goods shipped, they answered, "To M. J. Smith & Co."; also, that the son stated to one of them on the street: "We wish you to ship the goods immediately. We want them as soon as possible." It was also given in evidence that one of said representatives asked plaintiff the question, "Who are your partners?" and she an-

swered, "My creditors are my partners"; and the question, "Why do you do business in that name?" to which she answered, in effect, "That is my business."

The essential elements of estoppel by conduct are: 1. There must have been a false representation or concealment of material facts; 2. The representation must be plain and certain; 3. The party relying on the representations must have been ignorant of the facts. The representation must have been made, or the concealment practiced, with the intention that it should be acted upon. The other party must have been induced to act upon the representations or concealment. Bigelow on Estoppel, 5th ed., p. 570; *Burk v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Gentry v. Gentry*, 122 Mo. 221, 26 S. W. 1090; *Monks v. Belden*, 80 Mo. 639; *Blodgett v. Perry*, 97 Mo. 274, 10 S. W. 891; Story's Equity Jurisprudence, sec. 191. We do not think the evidence sufficient to estop plaintiff from claiming her rights of exemption. The evidence discloses the fact that M. J. Smith, plaintiff's husband, had carried on a similar business in the same building, but had quit the place about six years before she bought said goods, and had been living all that time in a distant state, separate and apart from plaintiff, and contributed but little, if anything, for the support and maintenance of plaintiff's children, and nothing for her support. It also appears that the sign used by the husband was still over the door. We do not believe from the evidence in this case that the traveling salesmen believed at the time they sold the goods to plaintiff that they were selling to a partnership. Unless they thought they were dealing with a partnership, and were induced to believe that by the conduct of plaintiff, and that plaintiff's said action was for the purpose of inducing them to believe that as a fact, plaintiff is not estopped. *Gentry v. Gentry*, 122 Mo. 221, 26 S. W. 1090; *Blodgett v. Perry*, 97 Mo. 274, 10 S. W. 891; Bigelow on Estoppel, 3d ed., 490, 491. The law does not favor estoppels, because they operate to shut out the truth, and prevent parties from asserting or defending their rights by proof of actual existing facts. To estop plaintiff in this case is to make her a member of a partnership when no such partnership exists, is to take her individual property from her control, and subject it to the payment of the debts of a partnership, when no such partnership was in

existence, to deprive her of the law of exemptions, and thereby to rob her and her children of that which she is entitled to as a means of support.

There are other errors assigned by appellant, but we do not deem it necessary to consider them. The judgment of the district court is reversed, and the case remanded for a new trial.

Bethune, J., concurs.

Hawkins, J., concurs in the reversal.

BAKER, C. J.—I dissent. I protest against the ease and facility with which this court resolves itself into a trial court, and passes upon detached questions of fact, without having seen or heard the witnesses testify. The fact that the finding of the lower court is contrary to the judgment of this court, or this court, looking at the evidence as written, would come to a different conclusion from the trial court, or that the finding is apparently against the mere weight of the evidence, does not authorize a reversal of the judgment upon the ground that the evidence is insufficient to support it. If there be some substantial evidence upon which the finding may be lodged, the judgment must be sustained so far as any objection to the sufficiency or insufficiency of the evidence goes, and the reviewing tribunal will go no further than to ascertain if such testimony is in the case. These rules are formulated in many decisions. No questions of law are raised by the appeal, and the sole inquiry is one of fact,—viz., Did the plaintiff obtain credit in a manner which will estop her from denying the existence of a partnership styled M. J. Smith & Co.? Such a firm may in fact not have existed, but if she did business under a fictitious firm name, and in such name obtained credit, her property, as to the creditor and his rights and remedies, will be the same as if such firm did in fact exist, and was composed of two or more partners. *Rosenbaum v. Hayden*, 22 Neb. 744, 36 N. W. 147; 2 Hermann on Estoppel, 1230.

The following is the substance of the evidence: That the agents of the judgment creditors sold the goods at the place of business occupied by the plaintiff and her son, a young man. They both ordered the goods; that is, they both participated in making the orders, the son being especially active in select-

ing and designating the goods to be purchased; the mother, being present, she was usually consulted, and concurred. The orders were sometimes written, but, whether written or verbal, they were always to the effect: "We want so and so." They were made in the name of M. J. Smith & Co., and the goods were shipped and received in that name by plaintiff and her son. The business was conducted under the name of M. J. Smith & Co. The son appeared to be the general manager. He had been engaged in and about conducting the business for several years with his mother. When approached for a settlement for the goods purchased, he claimed either that the business was his own or that he was a copartner in it. When the first levy was made, the plaintiff declared that she had nothing to do with the business; that it belonged entirely to her son. When asked why the goods were tagged M. J. Smith & Co., she said that was a secret, and she would not tell everybody her business. She was not a witness in this case, and has given no testimony. The business was rated in R. G. Dun's Commercial Agency under the name of M. J. Smith & Co. The agents declare that they believed the mother and son to be copartners from what they said and did, and they sold them the goods with that understanding, and that nothing was said to give them a different idea. Thus, it appears that plaintiff acted under a fictitious firm name, and bought the goods, and had them shipped to her, and received them, in such name. She failed to disclose the real facts, and received the benefits of the supposed partnership, since the testimony is, that the salesmen were induced to believe that the firm existed, and, upon the strength of that, sold her the goods. She is bound by her indirect representations arising from her conduct, as much as if she had stated to the creditors directly and in express terms that the firm existed, and that she was a member of it. 1 Lindley on Partnership, 42 (marginal). It is well settled that exemption laws do not apply to partnership property as against partnership debts. It is said that the law does not favor estoppels. It is proper, however, to observe that it abhors fraud. Some of the identical goods she got from her creditors are now being claimed by her as exempt from execution issued on a judgment for the purchase price. She has made no explanation whatever of any of the circumstances. The cases cited in the majority opinion

have no application to the facts under consideration. None of them arose upon sale of goods to a supposed firm. They are cases upon dower, ejectment, title to lands, etc., and different facts are stated than those here. They can serve no purpose in this connection other than to fill space.

The finding of this court that the traveling salesmen did not believe, when they sold the goods, that they were selling to a partnership, is a gross invasion of the province of the trial court, wholly unwarranted by any rule of law, and is directly against the evidence in the case. For these reasons, I think the reversal is wrong.

[Civil No. 368. Filed December 23, 1895.]

[42 Pac. 952.]

ARIZONA LUMBER AND TIMBER COMPANY, Defendant and Appellant, v. WILLIAM MOONEY, Plaintiff and Appellee.

1. MASTER AND SERVANT—PERSONAL INJURIES—MACHINERY—DUTY TO GUARD.—Plaintiff cannot recover in an action for damages for personal injuries resulting from operating a saw, because of lack of a guard, where it appears that the saw in use was not designed to have such guard, was one of the best patterns, complete in all respects, in good order, and of a kind used by many other sawmills.
2. SAME — MACHINERY — DUTY TO FURNISH REASONABLY SAFE.—The master is not bound to provide the servant with machines which are absolutely the most convenient or most safe. His duty is sufficiently discharged by providing those which are reasonably safe and fit.
3. SAME—COMMON LABORER—MACHINERY—INSTRUCTION—SKILLFULNESS—INJURY FROM OTHER CAUSE—RELEVANCY.—Allegations that plaintiff was a common laborer, and, without knowledge of the use of the machine, he was put to work without instructions as to how to operate it, are insufficient to warrant a recovery where the injury was the result of some cause other than unskillfulness.
4. SAME—LIABILITY FOR INJURY—INJURY MUST RESULT FROM MASTER'S OMISSION OR NEGLECT OF DUTY.—The mere existence of a defect, the mere occurrence of an accident, the mere omission of a duty, are not sufficient to create a liability for personal injuries. It is

necessary to proceed further, and to show that the defect or omission of duty caused the accident.

On rehearing. See former opinion, *ante*, p. 96.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. E. W. Wells, Judge. Reversed.

The facts are stated in the opinion.

Norris & Ellinwood, for Appellant.

Stewart & Doe, for Appellee.

ROUSE, J.—This is an action for damages for personal injuries which plaintiff received while working in defendant's sawmill. Plaintiff was operating a certain machine, called a "resaw." It was his duty to insert boards into said machine to be sawed, which work may be called "feeding." His position was in front of the machine while it was in operation, and behind the machine another employee was stationed, whose duty it was to receive the lumber after it had passed through said machine, and dispose of it. While plaintiff was thus engaged in operating said machine, in some way a piece or splinter of a plank which had gone through the machine was caught by the saw and thrown forward. It struck plaintiff in the face, and put out one of his eyes, and that is the injury for which damages are claimed. In plaintiff's second amended complaint, on which the case was tried, is the following: "(3) That on and about the said 10th day of October, 1890, the plaintiff was in the employ of the defendant as a common laborer, and was employed by defendant to perform and discharge such general duties and labor in and around said saw and planing mill as might be performed by any unskilled laborer. (4) That at the time aforesaid the said defendant conducted itself so carelessly and negligently that by and through the carelessness, negligence, and default of said defendant, it provided, used, and suffered to be used an unsafe, defective, insufficient, unguarded, and dangerous certain circular saw, used for ripping boards, commonly called a 'resaw.' (5) That on or about the 8th day of October, 1890, while plaintiff was so employed as aforesaid

by defendant, defendant directed plaintiff to assist in the operation of said circular saw, and the machinery therewith connected; that it therefore became the duty of plaintiff, under and by virtue of the instructions of the said defendant, to place lumber in position to be cut by said saw; that the said circular table-saw and the machinery therewith connected were imperfectly constructed, unguarded, defective, unsafe, and dangerous; that said imperfection, defectiveness, inadequacy, and unsafeness of said circular saw and the machinery therewith connected could have been by said defendant discovered and known by the use and exercise by him [it] of ordinary care and diligence; and that the same were, at the time aforesaid known to the defendant, but the same unknown to this plaintiff, William Mooney, and could not have by him been discovered or known by the use of ordinary care and diligence. (6) That plaintiff was inexperienced in the use of said saw and the machinery therewith connected, and ignorant of the dangerous character and condition thereof, and the defendant well knew, at the times hereinbefore mentioned, that plaintiff was so inexperienced and ignorant of the use and management of such machinery, and of the dangerous character and condition thereof; but that defendant negligently and carelessly neglected to and refrained from warning or in any wise informing said plaintiff of the said inadequate, imperfect, unguarded, unsafe, and dangerous condition and character of the said table circular saw and the machinery therewith connected. (7) That for want of due care and attention to its duty in that behalf and by reason of defendant's negligence in maintaining, using, and suffering to be used as aforesaid by plaintiff the said defective, unguarded, and dangerous saw and machinery, on the 10th day of October, 1890, and while the said plaintiff was so operating and working with and about said circular saw, and the machinery therewith connected, a board was caught and thrown by said saw, by reason of the said inadequacy, imperfection, defectiveness, unguarded condition, and unsafeness thereof, whereby the said plaintiff, William Mooney, was struck by said board, . . . without any negligence or fault of said plaintiff, William Mooney. (8) That thereby plaintiff was . . . disabled and disfigured, to his damage in the sum

of twenty thousand dollars." For answer, defendant pleaded a general denial, and the only issue thus presented is as to the injury inflicted, and the nature and condition of the said machine.

The pleader in the complaint was very extravagant in the use of qualifying words descriptive of the machine which plaintiff was operating at the time of the injury, but, notwithstanding that extravagance, we are not advised of any particular defect on which the right of action is based. The words "defective," "insufficient," and "unguarded," and "dangerous," and words of similar import, were employed, but not in a way as to direct attention to any particular defect. Treating the complaint, for the purpose of this opinion only, as sufficient to constitute a cause of action, and assuming that the injury complained of resulted from a defect in the machine in not having a certain guard, as no guard is specified in the complaint, we are limited in our determination thereof to the guard mentioned in the evidence. It is alleged in the complaint that the injury was caused by a board being caught by the saw and thrown forward. There was evidence offered and admitted on the trial that the machine had no guard to prevent pieces of boards caught by the saw from being thrown forward; that said guard should be a plank put up in front of the saw in some way that it would catch flying pieces; also that some other resaws had guards made in that way. Plaintiff was permitted to introduce witnesses as experts, and to have them give evidence as to additional appliances and improvements which the said saw, in their opinion, should have, other than those attached to and embraced in the model of said saw. The evidence discloses the fact that there are many different kinds of such machines in use, and that the one complained of is a machine of one of the best patterns; that at the time of the injury all the parts of said machine were in place, and none of its parts were missing; also that, according to the pattern of such machine, no such guard as that described was designed or intended to be used,—i. e. that in the model of said machine such guard was not a part of it. The machine had been used for some time before the accident, and no similar injury had been caused, and nothing had resulted in its use to indicate that such an injury might result in that way by its use, and the machine

in its then condition was of a kind used by the proprietors of many other sawmills.

The master is not bound to provide the servant with the very best implements which can be procured (*Bajus v. Railroad Co.*, 103 N. Y. 312, 57 Am. Rep. 723, 8 N. E. 529), nor those which are absolutely the most convenient or most safe. His duty is sufficiently discharged by providing those which are reasonably safe and fit. 1 Shearman and Redfield on Negligence, sec. 196; *Burke v. Witherbee*, 98 N. Y. 562; *Smith v. St. Louis etc. Ry. Co.*, 69 Mo. 32, 23 Am. Rep. 484. Still less is he bound to furnish every new improvement or invention. *Sweeney v. Envelope Co.*, 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358. If it be concluded that if a guard had been put up in front of the machine the injury would not have occurred, inasmuch as the machine in use at the time of the accident was not constructed with a view of having such guard, defendant is not liable for any injury caused by the absence of such guard. *Id.*; *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 411, 3 Am. Rep. 143; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56.

Plaintiff alleged that he was only a common laborer, and, without any knowledge of the use of the machine, he was put to work therewith, without any instructions as to how to operate said machine. Such allegations are not sufficient to warrant a recovery unless it should be established that the injury received was such as resulted to him by reason of his unskillfulness. If the injury received was such as resulted to him by some cause other than unskillfulness, the fact that plaintiff was not a skillful operator would have no bearing on this case. The mere existence of a defect, the mere occurrence of an accident, the mere omission of a duty, are not sufficient to create a liability. It is necessary to proceed further, and to show that the defect or omission of duty caused the accident. *Haley v. Earle*, 30 N. Y. 208; *Pakalinsky v. Railway Co.*, 82 N. Y. 424.

It is not necessary to consider the many other questions presented by the record. At the close of the evidence the defendant asked for a charge to the jury that they return a verdict for the defendant. This charge being refused, the case was submitted to the jury, and a verdict was returned for plaintiff for damages in the sum of thirty-five hundred dollars.

The charge requested by defendant should have been given for the reasons set forth in this opinion, and for that error the judgment is reversed, and the case remanded.

Bethune, J., concurs.

Baker, C. J., took no part in this case.

HAWKINS, J.—I concur in reversing this case for the errors appearing in the record, but do not think the demurrer to the evidence should have been sustained. I think the cause should be, for the reasons appearing in this opinion and on the records, reversed, and a new trial granted.

[Criminal No. 101. Filed December 23, 1895.]

[42 Pac. 953.]

JOSEPH CURBY, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—RAPE—EVIDENCE — SUFFICIENCY.—Evidence upon a prosecution for rape by a father sixty years of age upon a daughter aged eighteen, showing that the parties resided in the same dwelling, and had adjoining bedrooms, with a door from one to the other, for nearly twelve months before the time of the alleged assault; that it was first committed in the daytime, on Sunday, when people were abroad; that after the first act, at intervals of two or three days, it was repeated, and that at each time she exclaimed, "Father, have mercy on your own flesh and blood!" that after the completion of the first act she resumed her household duties, and there was no apparent change in the relations between them; that a month after the alleged assault he purchased her a gold watch and chain and presented it to her four days before his arrest, is insufficient to support a conviction.

BETHUNE, J., dissenting.

2. SAME—SAME—SAME—DEFENSE—MOTIVE OF PROSECUTING WITNESS.—

It is competent for the defense to show, on a prosecution for rape, that the prosecutrix was actuated by a motive, which was to shield her lover, whose attentions were paid to her against defendant's consent.

3. SAME—EXAMINATION OF DEFENDANT—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 2040, CITED.—A defendant can only be examined by the

prosecution about the matters testified to in his direct examination. Statute, *supra*, cited.

4. SAME—RAPE—EVIDENCE — UNCORROBORATED TESTIMONY OF PROSECUTRIX SUFFICIENT.—A conviction for rape can be had on the uncorroborated testimony of the woman ravished.
5. SAME—SAME—SAME—REPETITION OF ACT—CONSENT.—If, after the first act is accomplished, it be repeated at intervals, and the woman is of the age of discretion, and has the opportunity to make complaint, and she makes none, or if she consents to an act after the first intercourse, such conduct will be evidence that the first act was performed with her consent, and she was not ravished.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. J. D. Bethune, Judge. Reversed.

Statement of facts by Rouse, J.

On May 18, 1894, an indictment was returned, accusing Joseph Curby of the crime of rape, committed January 14, 1894, on Laura Curby. To the indictment defendant demurred. The demurrer was overruled, and defendant entered a plea of not guilty. The trial was had May 24, 1894. A verdict of guilty was returned, and judgment pronounced thereon, by which defendant was sentenced to the penitentiary for life. Joseph Curby resided in a house at the limits of Tombstone. The nearest dwelling to his was one hundred and eighty-five feet away. He was a dealer in second-hand furniture, and had his place of business in the city of Tombstone. He owned an express-wagon, which he used in delivering goods and to ride in, in going to and from his place of business. Laura Curby, the prosecutrix, resided in San Francisco until the first part of the year 1893, when she took up her residence with the defendant. She worked at a dressmaker's in Tombstone for about six months just prior to the date when defendant was arrested. She kept defendant's house, and after doing up the housework in the mornings she would go to her work at the dressmaker's, where a number of women were employed. On the trial she testified that the defendant assaulted her in his bedroom on Sunday, January 14, 1894, at between eleven and twelve o'clock in the day; that she resisted him to her utmost; that he overpowered her; that she screamed; that he put his hand over her mouth; that while the act was being

performed she exclaimed, "Father, have mercy on your own flesh and blood!" that when the act was over she went into her own bedroom, and, when she recovered from the exhaustion caused by her efforts to prevent the act, she went about the doing of her housework; that from that date down to the twenty-sixth day of February, 1894, defendant raped her as often as three times a week, and that she resisted him every time to her utmost; and that at each time, while the act was being performed, she exclaimed, "Father, have mercy on your own flesh and blood!" She testified that she had not reported his conduct to any one, giving as a reason for her silence that she had no friends to whom she could go and report it to, and the further reason that she was afraid he would kill her. For nearly one year Laura Curby resided in the same house with her father, the defendant. Their bedrooms were adjoining, with a door from the one to the other. She kept the house. They made visits together, and received visitors. During that period he attended to his store in the city, and his other business, and she worked six months of the time at the dressmaker's, where several matrons were engaged in business. She rode on defendant's wagon with him frequently between their residence and the business house. Their conduct towards each other was marked by no change after the date of the alleged assault from that which existed prior to that date. She testified that he assaulted her in December, 1893, but at that time, she said, "He tried to get the best of me, but did not succeed." On the trial, Mrs. Curby, whose residence is San Francisco, and who is defendant's divorced wife, of sixteen years' standing, was offered as a witness for the prosecution, and only two facts were proved by her, or attempted to be proved: (1) "That Laura Curby is the defendant's daughter"; and (2) "that she is the divorced wife of defendant, of sixteen years' standing." Evidence was introduced to the effect that after the date of the first rape Laura requested defendant to purchase for her a diamond ring, and that he suggested to her that a watch would suit her better; that she agreed with him in that suggestion; and that he did purchase her a gold watch and chain, and presented them to her on her birthday, February 22d, just four days before he was arrested on this charge. At the date of the trial, defendant was nearly sixty years old, and he had been a grandfather for over seven

years. Laura Curby, the prosecutrix, was eighteen years old. The defendant offered to prove, or attempted to prove, that Laura was prompted in making the charge by a desire to shield her lover, and to punish defendant for interfering with the movements of her lover in his attentions to her; that is, he attempted to prove that she had a motive for instituting the prosecution against him. The court did not allow him to offer such evidence. Defendant was sworn as a witness, and after closing his testimony he was examined by the prosecution, and forced by the court to answer questions propounded to him by the prosecution which were not connected with the matters testified to in his examination in chief. From the judgment of conviction he appeals.

Allen R. English, for Appellant.

T. D. Satterwhite, Attorney-General, William Herring, of Counsel, for Respondent.

ROUSE, J. (after stating the facts).—It is not necessary for us to pass on the action of the court in overruling the demurrer to the indictment, or that we should express an opinion as to the validity of the indictment in this case. Passing those questions, we find defendant was accused of the crime of rape, tried therefor, convicted, and sentenced to the penitentiary for life. Rape is justly considered one of the most heinous crimes. A low degree of moral turpitude must be attained by a man, in order to commit this crime. Against a man who commits this crime, popular indignation is aroused, and exists with the first information that the man is accused of or charged with the offense. Indignation starts with the accusation. The case, in part, is prejudged before an examination is had. Support the charge with the allegation that the victim is the mother, sister, or daughter of the accused, and a trial, unless it be well conducted, is a useless proceeding, for the accused will be condemned before the trial. The sentiment just mentioned gave birth to this expression of an able jurist: "Rape is easy to charge. It is hard to disprove." Care should be used by the court, in all criminal trials, to prevent convictions on prejudice alone. On account of the nature of the crime of rape, in trials therefor, the court should be exceedingly careful. Laura Curby and Joseph Curby, her father, re-

sided in the same dwelling, and had adjoining bedrooms, with a door from one to the other, for nearly twelve months before the time fixed on which the alleged assault was made. Lodging so near each other during all that period, with opportunities for such an assault at hand every night, when an outcry would summon no protector to her defense, the assault was deferred for over ten months. It is alleged that he chose an hour in the daytime, when people were abroad and an outcry would likely attract attention, and on a Sunday (a day on which unusual sounds would be sure to be noticed), to commit the act. After the first act, at intervals of two or three days, it is said, the act was repeated, and that at each time she exclaimed, "Father, have mercy on your own flesh and blood!" That after the completion of the first act she went into her bedroom, and that after she had rested a while, and recovered from the exhaustion caused by her resistance, she went to work, in doing up her housework. She rode on defendant's wagon with him after the performance of some of those acts to his place of business and elsewhere. After the act she importuned him to purchase her a diamond ring, and he purchased her a gold watch and chain, instead of a ring, and presented them to her on February 22d, her eighteenth birthday,—nearly forty days after the alleged assault, and only four days before she made the complaint on which he was arrested. During the period between the day on which the alleged assault was made and the day of his arrest she worked at the dress-maker's, where there were a number of women employed, and went about the city of Tombstone as she had done before that period, and was in company with those she was accustomed to be with. The facts and circumstances in evidence, the age of the accused, the conduct of the prosecutrix after the date of the alleged assault, the nature of the exclamations said to have been uttered by the prosecutrix at the time of the acts, the number of acts alleged to have been had, and the failure of the prosecutrix to make complaint, lead us to the conclusion that no rape was committed. Remove from this case the fact that Laura Curby is defendant's daughter, and no one familiar with the nature of the crime would, from the evidence in the case, believe defendant guilty of this crime. This case must be considered as though she was not related to him. If he committed the act with force, against her consent, it was rape.

If he committed the act with her consent, it was incest. He is guilty of rape, or not guilty of anything, on this indictment. On the trial the prosecution seemed anxious to prove the relationship of the parties, and lost no opportunity to establish that fact. Mrs. Curby, who lives in San Francisco, and who is defendant's divorced wife, was introduced by the prosecution as a witness, apparently for no other purpose than to prove that Laura is his daughter, and the further fact that she is defendant's divorced wife, of sixteen years' standing. At least, no other facts were attempted to be established by that witness. Defendant attempted to show that the prosecutrix was actuated, in making the charge against him, by a motive, and to show that the motive was to shield a lover of hers, whose attentions were paid to her against her father's consent. This the court did not permit. We think the court erred in its rulings in that respect. It is competent to show, in every criminal prosecution, the motives of the prosecuting witnesses. Their motives are to be considered by the jury, in order to determine the question of the guilt or innocence of the accused. Especially is the motive of the injured woman, in a charge of rape, material to be shown and considered. The prosecution propounded to defendant questions about matters not testified to in his direct examination, and he was compelled to answer those questions. A defendant can only be examined by the prosecution about the matters testified to in his direct examination. Pen. Code, par. 2040.

Counsel for appellant contends that a conviction for rape cannot be had on the uncorroborated testimony of the woman ravished; that her evidence alone is not sufficient; that Laura Curby was not corroborated by any other witness in the case, and for that reason the defendant should be acquitted. We cannot give our assent to that contention. Corroboration is not necessary or required, as a rule. It is required only in cases in which the prosecuting witness occupies in some degree the *status* of a *particeps criminis*. The woman who is ravished commits no crime by that act. Of all persons she is the most unfortunate. She is entitled to the sympathy of society, and in her interest the scales of justice should be speedily adjusted. Evidence of the victim alone, in a charge of rape, is sufficient to convict; but as "rape is easy to charge, and hard to disprove," great care should be exercised on the trial

of one accused of this crime to prevent a conviction on prejudice alone, on account of the prejudice which exists against the crime itself. It must be established by evidence that the victim was ravished; she must be overcome with force which she has not the power to resist in an honest effort to do so, or be compelled to yield by threats of violence, which, if executed, would endanger her life; and she must, in good faith, if of the age of discretion, believe her assailant has the power at that time to carry the threats into execution, and will do so immediately on her refusal to obey. She must resort to every reasonable means at hand, if of the age of discretion, to prevent the act, and yield not as long as she can discover an avenue through which she may make her escape. She cannot be neutral or passive. If she is, she will be *in pari delicto*, and it will not be rape. If, after the first act is accomplished, it be repeated at intervals, and the woman is of the age of discretion, and has the opportunity to make complaint, and she makes none, or if she consents to an act after the first intercourse, such conduct will be evidence that the first act was performed with her consent, and that she was not ravished. We do not think the evidence sufficient to sustain the judgment. The judgment is reversed and the case dismissed, and it is ordered that the defendant be released from the penitentiary, and that for that purpose the proper writ be issued.

Baker, C. J., and Hawkins, J., concur.

BETHUNE, J. (specially concurring in the reversal of the judgment).—In this case I concur in the opinion that the judgment should be reversed, on the ground of errors committed by the trial court. I do not concur in the judgment discharging the defendant, but think the case should be sent back to the trial court for a new trial. I think the trial court erred in not permitting certain testimony offered by defendant, but I am not prepared to say that the evidence adduced at the trial was insufficient to convict the defendant, but think the jury should be permitted to judge that. I do not agree with my brethren that this case must be considered as though the prosecutrix was not related to defendant. I think the fact that she is his daughter, taken in connection with the surrounding circumstances, would make a material difference in considering

the lapse of time between the first commission of the offense and her telling of it, and her apparent passive submission to subsequent commissions. With shame to our civilization be it confessed, there are not wanting instances of rape by fathers upon their daughters, and the existence of that relation puts a different phase upon a case like the one under consideration and ordinary cases of rape. The prosecutrix testified that she was in mortal fear of her father, and that he was rough and harsh to her, and threatened to kill her if she told on him. "Where a father has established a kind of reign of terror in his family, and his daughter, under the influence of dread and terror, remains passive while he has connection with her, he may be found guilty of rape." *Reg. v. Jones*, 4 Law T. (N. S.) 154. And again: "Where the defendant had intercourse with a fourteen-year-old step-daughter, in her bed, in a room where three younger children were sleeping; she told him not to get into bed, and threatened to tell her mother, but made no outcry, and no complaint for six days,—it was held that under the circumstances a conviction of rape must be sustained." *Bailey v. Commonwealth*, 82 Va. 107, 3 Am. St. Rep. 87. All these matters of evidence, I think, should be left to the consideration of the jury, with proper instructions from the court, and opportunity being given the defendant to show any motive the prosecutrix may have in bringing the charge, which latter was not done in this case. For that reason I think the judgment should be reversed and a new trial granted.

[Civil No. 485. Filed December 26, 1895.]

[42 Pac. 1025.]

W. A. HARWOOD, Defendant and Appellant, v. A. WENTWORTH, Plaintiff and Appellee.

1. STATUTES—EVIDENCE OF—JOURNAL NOT ADMISSIBLE TO ALTER—REV. STATS. ARIZ. 1887, PARS. 1867, 1868, 1869, 1870; REV. STATS. U. S., SEC. 1844; 1 SUPP. REV. STATS. U. S., P. 230, CHAP. 212, CITED AND CONSTRUED.—A copy of an act of the territorial legislature certified under the hand and seal of the secretary of the territory is evidence of the act therein contained, and the provisions of such act cannot

be added to or taken from by evidence that the journals of the respective houses of the legislative assembly show that said act is not correct. Statutes, *supra*, cited and construed.

2. SAME—SAME—DUTY OF SECRETARY OF TERRITORY—AUTHENTICATION—REV. STATS. U. S., SEC. 1844, CITED.—If a document purporting to be an act of the legislative assembly be presented to the secretary of the territory, having upon it the signature of the governor, and purporting to have been approved and signed by him as a law, the secretary may treat it as a law, and cannot resort to any other means to determine whether it is a law or not. Statute, *supra*, cited.
3. SAME—SAME—JOURNALS—REV. STATS. ARIZ. 1887, CHAP. 4, TIT. 60, PAR. 2895, SEC. 18, CONSTRUED.—The provisions of the statute, *supra*, do not make the journals of the legislative assembly evidence as to the provisions of an act of the territorial legislature.
4. SAME—CONSTITUTIONAL LAW—CHANGING FEES DURING TERM—ACT NO. 51, LAWS 1895, ACT MARCH 21ST—SPECIAL LEGISLATION—NOT IN CONFLICT WITH HARRISON ACT—1 SUPP. REV. STATS. U. S., P. 503 (ORGANIC LAW OF ARIZONA, REV. STATS. 1901, PAR. 63).—The statute, *supra*, changing the mode of classification of counties from the number of registered voters to the assessed valuation of the property within the counties, although changing the fees of public officers during the term for which such officers are elected, is not void as in conflict with the Harrison Act, it not being special legislation.

AFFIRMED.—162 U. S. 547, 40 L. Ed. 1069, 16 Sup. Ct. Rep. 890.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. J. D. Bethune, Judge. Affirmed.

Statement of facts by Rouse, J.

Plaintiff instituted proceedings against defendant in the district court. The material parts of the complaint are as follows: “(2) That at the general election held throughout the territory of Arizona on the 6th day of November, A. D. 1894, plaintiff was duly elected to the office of county recorder of said county of Cochise, and thereafter duly qualified as such, and on the 1st day of January, 1895, entered upon the discharge of his duties as such recorder, and ever since has been and now is the duly elected, qualified, and acting recorder of said county of Cochise. (3) That at the time the plaintiff was so elected to said office, and entered upon the discharge of the duties thereof, as aforesaid, said

county of Cochise was what was denominated a first-class county of said territory. (4) That on the — day of January, 1894, . . . the defendant was duly elected and appointed to the office of clerk of said board of supervisors of said Cochise County, . . . and duly qualified as such clerk, and entered upon the discharge of the duties of said office. (5) That thereafter, and on or about the 21st day of March, 1895, the legislative assembly of the territory of Arizona, for the purpose of classifying the counties of said territory, and fixing the compensation of county officers therein, passed an act entitled 'An act classifying the counties of the territory and fixing the compensation of the officers thereof,' which was approved the 21st day of March, A. D. 1895, by the governor of said territory; that said act of the legislature went into force and effect thirty days after its passage and approval, to wit, on the 21st day of April, 1895; that by the provisions of said act the counties of said territory were divided into six classes, according to the assessed valuation of the property in said several counties; that according to said classification of said counties as provided in said act, and according to the terms thereof, said county of Cochise became and was and is a county of the third class; that, by the provisions of the third subdivision of section 2 of said act, recorders of third, fourth, fifth, and sixth class counties are made *ex officio* clerk of the board of supervisors of the respective counties. And plaintiff avers that, as such recorder of said county of Cochise, he is now, and has been since said 21st day of April, 1895, *ex officio* clerk of the board of supervisors of said county of Cochise, and as such is entitled to the possession of all the books, papers, records, seal, and documents pertaining to said clerk's office that are now in the hands of, and in the possession and under the control of, said defendant; that heretofore, and subsequent to the date when the said act of the legislature went into effect as aforesaid, to wit, on the — day of May, 1895, plaintiff . . . as such recorder and *ex officio* clerk of the board of supervisors of said county, demanded of defendant that he deliver to plaintiff, as recorder and *ex officio* clerk of the said board of supervisors of said county, said books, papers, records, seal, and documents pertaining to said office, but . . . defendant then and there refused, and ever since has and still does refuse, and still does wrongfully

and unlawfully detain possession of all of said books, papers, records, seal, and documents pertaining to said office of *ex officio* clerk of said board of supervisors, and deprive plaintiff of the possession, to plaintiff's damage. . . . Wherefore plaintiff prays that a writ of *mandamus* be issued, . . . commanding him, the said defendant, . . . to forthwith deliver all said books . . . to plaintiff, . . . and for costs of suit."

This complaint was supported by plaintiff's affidavit. To said complaint defendant on June 3, 1895, filed an answer, in which he admitted he had possession of the books, records, etc., described in the complaint, and further alleged as follows: "Defendant alleges that he is the duly appointed and qualified clerk of the board of supervisors, and as such is lawfully entitled to hold said office. He alleges that the proposed act of the legislative assembly is not a law; that the same did not pass the said assembly as alleged. He alleges that the said act, as the same passed both houses of said legislative assembly, contained a provision, section, and clause that the said act should not take effect and be in force before January 1, 1897, that the said clause or section was stricken out, omitted, and taken from said act after the same had passed both houses of said legislative assembly; that that clause is a part of said act, and that the said act, if valid, does not take effect until —; that there was also a clause that 'all acts or parts of acts in conflict with this act are hereby repealed,' and that said clause was omitted and stricken out in the same way. Alleges that the said alleged act was not duly passed by the legislative assembly, or by either house thereof, and that the same is not a law."

The case was submitted to the court for trial without a jury on an agreed state of facts, consisting of a certified copy of the act referred to, under the hand and seal of the secretary of the territory, as published in the Session Laws of the eighteenth legislative assembly, on pages 68, 69, and 70, signed by the governor, president of the council, and speaker of the house; the affidavits of A. J. Doran, president of the council, J. H. Carpenter, speaker of the house, Charles F. Hoff, clerk of the council, and C. D. Reppy, clerk of the house. In the affidavit of Doran it was alleged, in effect, that it was the custom for him, as president, to sign bills when presented to him by the chairman of the engrossing and enrolling com-

mittee of either house, whether the council was in session or not, and if council was in session there was no formality gone through with, and no notice given that he was about to sign a bill. Carpenter's affidavit was to the same effect, and, further, that he did not read and compare a bill at the time he signed it; that he was certain that said act, when it passed the house, had a clause in it that it should go into effect January 1, 1897. With the affidavits of Hoff and Reppy, as parts thereof, were certain portions of the journals of the council and house, containing the entries therein pertaining to the disposition of said act during its progress through said houses. The court held that the enrolled bill, which had been signed by the presiding officers of the respective houses of the legislative assembly, and approved by the governor, and filed with the secretary of the territory, could not be attacked by any evidence that said act, as it was when lodged with the said secretary, is the law, and the journals of the legislative assembly could not be received as evidence to add anything thereto, or to take anything therefrom; that no evidence of any kind could be received to change or alter said act in any particular. The action is based on the provisions of act No. 51 of the eighteenth legislative assembly of the territory of Arizona, as it appears in the published laws of that session, on pages 68, 69, and 70. Plaintiff was the duly elected and qualified recorder of Cochise County, and, as such recorder, claims possession of the books, records, etc., of the clerk of the board of supervisors of said county, as per the provisions of the third subdivision of section 2 thereof. If said act is valid, Cochise County is a county of the third class, and plaintiff is *ex officio* clerk of the board of supervisors of said county. Said act was first introduced in the house as house bill No. 9. The certified copy of said act offered in evidence by the plaintiff was under the certificate and seal of the secretary of the territory. Said certificate is as follows: "I, Charles M. Bruce, secretary of the territory of Arizona, do hereby certify that the within copy is a true and complete transcript of the house bill No. 9 of the eighteenth legislative assembly of Arizona, filed in this office the 22nd day of March, A. D. 1895, at 4 o'clock P. M., as provided by law. In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at the city of Phoenix this 29th

day of March, 1895. [Seal.] CHARLES M. BRUCE, Secretary of the Territory.” Appellant contends that there were in house bill No. 9, when it passed both houses of the legislative assembly, two sections, numbered 5 and 6, as parts thereof, but that said sections were omitted from said bill, in the enrollment thereof, before the bill was signed by the presiding officers of the respective houses. The two sections which he claims were omitted were as follows:—

“Sec. 5. All other acts and parts of acts in conflict herewith are hereby repealed.

“Sec. 6. This act shall take effect and be in force from and after January first, 1897.”

In support of said claim he offered in evidence the affidavits of the presiding officers and the chief clerks of both houses of the legislative assembly, and the parts of the journals of said houses pertaining to said bill. Appellant contends that said act is in conflict with the provisions of the act of Congress designated as the “Harrison Act,” and for that reason void. The only error complained of by appellant is the ruling of the district court in refusing to receive evidence to explain or alter said act, and the constitutionality of the act. The judgment was for plaintiff, and defendant appeals.

Barnes & Martin, for Appellant.

This law is unconstitutional and void, because in violation of that provision of the so-called Harrison Act which prohibits the passage of local or special laws creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

This act, for the purpose of fixing the compensation of officers, divides counties into six classes, based upon the assessment of property.

This classification violates the principle of uniformity, and is void.

Classification by population has been upheld as approximately equal, and so general. But such a classification as this, which affects the people in one part of the territory differently than in others, is local and special. This law makes the county recorder *ex officio* clerk of the board in all but counties of the first class. It therefore legislates the clerks appointed by the boards in all the counties, except three, out

of office. The law allows the board to allow a deputy to the recorder in some of the counties and in others does not, so differently affecting those now in office, and hence it is local and special.

The classification must be reasonable, the objects must be germane to the legislative purpose, with similar characteristics and like relations, and if not so, the classification is incomplete and faulty, and the legislation void. *State v. Trenton*, 42 N. J. L. 486; *State v. Parsons*, 40 N. J. L. 11; *State ex rel. Helfer v. Simon*, 53 N. J. L. 550, 22 Atl. 120; *Earle v. Board*, 55 Cal. 489; *State v. Trenton*, 54 N. J. L. 444, 24 Atl. 478; *State ex rel. Randolph v. Wood*, 49 N. J. L. 88, 7 Atl. 286; Sutherland on Statutory Construction, secs. 127, 128, 129.

George W. Swain, District Attorney, for Appellee.

Wiley E. Jones, *Amicus Curiae*.

This action questions the validity of Act No. 51 of the eighteenth legislative assembly, generally known as the "County Classification Law."

Can an enrolled bill, duly signed by the presiding officers of both houses of the legislature, approved by the governor, and deposited in the office of the secretary of the territory, be impeached by the journals of the legislature or other purported evidence, as sought by appellant in this case?

It has been well settled in English courts that it is not competent to go behind the enrolled bill, as the parliament roll is considered a record of as great dignity as a court of record, importing absolute verity. 2 Blackstone's Commentaries, 330, says: "A record or enrollment is a monument of so high a matter, and importeth in itself such absolute verity, that if it be pleaded there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself."

Paragraph 1862 of the Revised Statutes of Arizona adopts the common-law rule of evidence in the following language: "The common law of England, as now practiced and understood, shall, in its application to evidence, be followed and practiced by the courts of this territory, so far as the same may not be inconsistent with this or any other law."

Paragraph 1867 Id. says: "The printed statute-books of this

territory . . . shall be received as evidence of the acts and resolutions therein contained.”

There is no law known to Arizona which recognizes or constitutes the journals of either house evidence for any purpose.

In the United States, seventeen states of the union and three territories, in their latest decisions, have held that the enrolled bill, duly signed by the presiding officers, approved by the governor, and deposited in the office of the secretary, is conclusive of its passage.

In other states where the journals have been explored by the courts, it was in recognition of an express provision of the constitution of such states which imposed certain restrictions upon the legislature that must be observed and such fact “entered upon the journals.”

See *Shuley Co. v. People*, 25 Ill. 163; *Town of South Ottawa v. Perkins*, 24 U. S. 154; *People v. Starne*, 35 Ill. 133, 85 Am. Dec. 348; *Wabash Ry. Co. v. Hughes*, 38 Ill. 186; *Hensoldt v. Petersburg*, 63 Ill. 159; *Larrison v. P. D. and A. Ry. Co.*, 77 Ill. 11; *In re Roberts*, 5 Colo. 535; *Massachusetts Mut. Life Ins. Co. v. Colorado Loan and Trust Co.*, 20 Colo. 6, 36 Pac. 794; *Currie v. Southern Pacific Co.*, 21 Or. 566, 28 Pac. 884; *State v. Rogers*, 22 Or. 348, 30 Pac. 77; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140.

The constitutions of the following states require the votes of each house to be taken on the final passage of every bill and entered on the journals, thereby making them evidence of the passage of laws: Arkansas, California, Colorado, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Montana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, South Dakota, Ohio, West Virginia, Washington, Wyoming, Tennessee.

In Alabama it is held that the validity of the seeming acts may be inquired into; but in its latest decision on the subject the court said: “If a particular thing is required by the constitution to be done, but not to be recorded, the mere silence of the journals will not invalidate it.” *Hall v. Steele*, 82 Ala. 562, 2 South, 650.

This court held that the journals were not evidence of pas-

sage in the absence of the enrolled act. *Graves v. Alsap*, 1 Ariz. 276, 25 Pac. 836.

In Arkansas the journals control the enrolled act. *Glide-well v. Martin*, 51 Ark. 559, 11 South, 882. It is noticeable that in this case, the latest decision in that state, the judges delivering the opinion intimate a wish that the English rule was in force, and the enrolled act conclusive.

In California the rulings have been various. In *Fowler v. Pierce*, 2 Cal. 165, the court permitted oral evidence to be introduced to show that an act was approved by the governor after adjournment. This case was overruled in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, where it was held that the enrolled act could not be impeached by the journals. This was followed in *People v. Burt*, 43 Cal. 560. After these two cases were decided, a new constitution was adopted in California, under which the journals have been examined to impeach the enrolled bill. *County of San Mateo v. Southern Pacific Ry.*, 8 Saw. 238, 13 Fed. 722; *Weil v. Kenfield*, 54 Cal. 111; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140.

In Connecticut the journals cannot be used to impeach the recorded act. *Eld v. Gorham*, 20 Conn. 8.

In *Dakota Territory v. O'Connor*, 5 Dak. 397, 41 N. W. 746, it was held that the signatures of the presiding officers to the passage of the enrolled bill is conclusive in the silence of the journals. (The question of a conflict between the enrolled act and the journals was not considered.)

In Delaware we are not aware of any case on the subject, nor in Georgia, although the court in the latter state has said: "No evidence except the journals is competent to show a failure to comply with the constitution." *Speer v. City of Athens*, 85 Ga. 49, 11 S. E. 802.

In Illinois the journals control in any conflict between them and the enrolled acts as to the validity thereof. *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 151; *People v. Hatch*, 19 Ill. 283; *Prescott v. Illinois etc. Canal Trustees*, 19 Ill. 324; *Schuyler County v. People*, 25 Ill. 181; *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *Wabash etc. R. R. Co. v. Hughes*, 38 Ill. 174.

In Indiana now the journals do not control the enrolled act. Formerly they were consulted for the purpose of impeaching

the act. The journals were referred to in *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *Coleman v. Dobbing*, 8 Ind. 156; *McCulloch v. State*, 11 Ind. 424; *Coburn v. Dodd*, 14 Ind. 347. The rule was changed, and the enrolled act held conclusive of its passage. *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Bender v. State*, 53 Ind. 254; *Edgar v. Board of Commissioners*, 70 Ind. 331; *State v. Denny*, 118 Ind. 382, 21 N. E. 252.

In Iowa the enrolled act in the secretary's office is held to be the ultimate proof of the law. *Clare v. State*, 5 Iowa, 510; *Duncombe v. Prindle*, 12 Iowa, 1. Where the validity of a constitutional amendment was in question, different provisions of the constitution apply. It was held that the journals could be consulted. *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609.

In Kentucky the question has not been squarely decided whether the journals in a conflict would overcome the presumption of the enrolled act, but the intimation of the court is that it would. *Commissioners v. Jackson*, 5 Bush, 680; *Auditor v. Haycroft*, 14 Bush, 284.

In Louisiana it is held that the enrolled act is conclusive. *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602; *Whited v. Lewis*, 25 La. Ann. 568.

In Maine the enrolled act is held to be the best evidence, and not to be overcome by the journals where its record is complete. *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325.

In Maryland the enrolled act was first held to be conclusive. Afterwards the decisions are that it may be impeached by the journals. The first series of cases is *Fouke v. Fleming*, 13 Md. 392; *Mayor of Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

Under the new constitution controlling the legislature in its acts, the following cases held that the enrolled act might be impeached by the journals and other evidence: *Berry v. Railroad Co.*, 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203; *Strauss v. Heiss*, 48 Md. 292.

In Michigan, in certain cases, the journals may be inspected, but "Courts cannot act on anything not found in the journals, and presume a (constitutional) requirement has been omitted unless such fact affirmatively appears in the journals." *People v. McElroy*, 72 Mich. 446, 4 N. W. 750.

In Mississippi the enrolled act is held conclusive. In one

case a different rule was laid down—namely, in the case of *Brady v. West*, 50 Miss. 68. The case was overruled. The following cases hold the law conclusive: *Green v. Weller*, 32 Miss. 650; *Green v. Weller*, 33 Miss. 735; *Swann v. Buck*, 40 Miss. 268; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825.

In Missouri the enrolled act was at first held conclusive, though where an amendment to the constitution was in question the journals were consulted. *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636. The following case held the enrolled act to be conclusive. *Pacific R. R. Co. v. Governor*, 23 Mo. 353, 66 Am. Dec. 673. Upon the change in the constitution the legislative journals have been allowed to impeach the recorded act. *Bradley v. West*, 60 Mo. 33; *State v. Meade*, 71 Mo. 266.

In Nebraska the journals were explored in the earlier cases, but in the last decision in that state the court said: "We do not understand that as to the mere routine of parliamentary business courts are required to interfere with legislative proceedings where no substantial requirement of the constitution has been violated. The signatures of the officers of the respective branches of the legislature attesting the due passage of the bill in question precludes an inquiry in that direction." *State v. Moore*, 37 Neb. 13, 55 N. W. 299.

In Nevada the enrolled act is held conclusive. *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *State v. Glenn*, 18 Nev. 34, 1 Pac. 186. In *State v. Tufty*, 19 Nev. 391, 3 Am. St. Rep. 895, where the constitution required an amendment to be entered in full on the journals, an amendment was held invalid because that requirement was not complied with.

In New Hampshire the enrolled act is controlled by the journals. Opinions of the justices, 35 N. H. 579, 45 N. H. 607, 52 N. H. 622. These were mere opinions by the request of the legislature, and were not judicial decisions in any litigated case contesting the validity of a law.

In New Jersey the enrolled act is held the most appropriate evidence of law, and is not overcome by inconsistent entries in the journals. *Pangborn v. Young*, 32 N. J. L. 29; *Freeholders of Passaic County v. Stevenson*, 46 N. J. L. 173; *Standard Underground Cable Co. v. Attorney-General*, 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733.

In New Mexico the enrolled act cannot be impeached by an

inspection of the journals. *Chaves v. Luna*, 5 New M. 183, 21 Pac. 346; *Lyons v. Woods*, 5 New M. 327, 21 Pac. 350.

In New York the Revised Statutes provided that the secretary of state should receive the enrolled act, and should indorse upon it the day, month, and year when the same became a law, and that his certificate should be conclusive of the facts stated therein. There was also a provision that no bill should be deemed to have passed by the assent of two thirds of the members, unless the fact was certified by the presiding officer of each house. The question arose in a number of cases whether certain acts had been passed which were acts of incorporation and which were required by the constitution of New York to be adopted by a two-thirds vote. It was held that for the purpose of ascertaining the vote recourse might be had to the original enrolled act on file in the secretary of state's office, and that the absence of the certificate of the presiding officers to a two-thirds vote avoided the act. *Thomas v. Dakin*, 22 Wend. 9; *Warner v. Beers*, 23 Wend. 103; *Hunt v. Van Alstyne*, 25 Wend. 603; *People v. Purdy*, 2 Hill, 31; *Purdy v. People*, 4 Hill, 384; *De Bow v. People*, 1 Denio, 9; *Commercial Bank of Buffalo v. Sparrow*, 2 Denio, 97. It was stated by one or two judges in a semble that the journals also might be examined, but these *dicta* have not been followed. The present law in New York is, that the journals cannot be examined to determine whether an act has been passed by the requisite vote. *People v. Chenango County Supervisors*, 8 N. Y. 317; *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377; *People v. Commissioners*, 54 N. Y. 276, 13 Am. Rep. 581. In the case of *People v. Petrea*, 92 N. Y. 128, where the constitution required that all acts to be valid must be reported by a commission, it was held that the journal might be resorted to to show that the act was not reported by the commission. This view grew out of a peculiar provision of the constitution, and does not take New York out of the line of those states which hold that the enrolled act cannot be impeached by the journals.

In North Carolina it is held that the enrolled act is conclusive. *Brodnax v. Groom*, 64 N. C. 244; *State v. Robinson*, 81 N. C. 409.

In Rhode Island the enrolled act is conclusive. "It is sufficient to establish the existence of a public law to find it in the records of the state. . . . An act will not be declared void

because the general assembly did not conform to another law in passing it." *State v. Septon*, 3 R. I. 119.

In South Carolina formerly the journals were permitted to control the presumption from the enrolled act, but all former decisions have been overruled by *State v. Town of Chester*, 39 S. C. 307, 17 S. E. 753. The enrolled act is held conclusive in the latest decisions in this state.

In Tennessee the enrolled act is conclusive if it is "signed by the speaker in open session and the fact is recorded. The journal need not show it received a constitutional majority on its passage." *Williams v. State*, 6 Lea, (Tenn.) 549.

In Texas the enrolled act is held to be the best evidence, and is not controlled by the journals. *Central Pacific Ry. Co. v. Hearne*, 32 Tex. 546; *Blessing v. Galveston*, 42 Tex. 641; *R. W. Co. v. Odum*, 53 Tex. 343; *Day Land and Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Usener v. State*, 8 Tex. App. 177; *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233; *Ex parte Tipton*, 28 Tex. App. 438, 13 S. W. 610. In *Hunt v. State*, *supra*, the journals were examined, but *Ex parte Tipton* overrules that case, and restores to authority *Usener v. State*, which held the enrolled act conclusive.

In Utah the enrolled act was held conclusive. *Territory v. Clayton*, 5 Utah, 598, 18 Pac. 632.

In Virginia the enrolled act is not conclusive, and the journals are permitted to control the presumption therefrom. *Wise v. Biggar*, 79 Va. 269.

In Washington the enrolled act is conclusive. *State v. Jones*, 6 Wash. 452, 34 Pac. 201.

The United States supreme court has never gone behind the enrolled bill and examined the journals of Congress to impeach the bill. It has sustained the decisions of Illinois in the cases where the state has interpreted its own constitution. *Town of South Ottawa v. Perkins*, 24 U. S. 154.

In *Gardner v. Collector*, 73 U. S. 499, the United States supreme court simply examined the journals, not to impeach the enrolled bill, but for the purpose of ascertaining the date of its approval, and thereby aid the court in giving it full effect.

In *Town of Walnut v. Wade*, 103 U. S. 683, the court simply followed *Town of South Ottawa v. Perkins*, and sustained the supreme court of Illinois.

In *Lyon v. Woods*, appealed from New Mexico, and cited previously, the United States supreme court sustained the supreme court of New Mexico, and refused to examine the journals to impeach the enrolled act. *Lyon v. Woods*, 153 U. S. 649, 14 Sup. Ct. Rep. 959.

In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495, the supreme court upheld the validity of the "McKinley Bill," wherein a section of the law passed was alleged to have been omitted in the enrolled act (the same as alleged in this case).

The Harrison Act does not prevent a decrease of official salaries during the term of office, nor does it prevent an office during a term from being abolished altogether. It merely says that, if done at all, it must be done by a general law.

The Classification Law is a general law classifying the twelve counties into six classes. The following authorities fully sustain such classification: *Longan v. County of Solano*, 65 Cal. 122, 3 Pac. 462; *State v. Graham*, 16 Neb. 74, 19 N. W. 470; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Cody v. Murphy*, 89 Cal. 522, 26 Pac. 1081; *In re Pittsburg*, 138 Pa. St. 401, 21 Atl. 757, 759, 761; *Knickerbocker v. People*, 102 Ill. 229; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *Koester v. Commissioners*, 44 Kan. 141, 24 Pac. 65; *Brooks v. Hyde*, 37 Cal. 376; *Wheeler v. Philadelphia*, 77 Pa. St. 348; *Kilgore v. Magee*, 85 Pa. St. 401; *Hymes v. Aydelott*, 26 Ind. 431; *Chicago Ry. Co. v. Iowa*, 94 U. S. 155; *McAunich v. Railroad Co.*, 20 Iowa, 343; *Board v. Leahy*, 24 Kan. 65; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *State v. Berka*, 20 Neb. 375, 30 N. W. 267, and many others.

ROUSE, J. (after stating the facts).—This action, though entitled a proceeding in *mandamus*, was in fact an action for an office by plaintiff, in his own right, as provided by title 62 of the Revised Statutes, entitled "Usurpation of Office." No question having been raised in the district court or in this court as to the form of the action, we will consider it only on the record before us.

The action is based on the provisions of act No. 51 of the eighteenth legislative assembly of the territory of Arizona, as it appears in the published laws of that session, on pages 68, 69, and 70. Plaintiff was the duly elected and qualified re-

corder of Cochise County, and, as such recorder, claims possession of the books, records, etc., of the board of supervisors of said county, as per the provisions of the third subdivision of section 2 of the act last mentioned. Cochise County is a county of the third class, as established by said act; and by said subdivision plaintiff is *ex officio* clerk of the board of supervisors of said county. In said subdivision is the following: "Third. . . . The county recorder shall be *ex officio* clerk of the board of supervisors. . . ." Said act was first introduced in the house as house bill No. 9. The plaintiff offered in evidence a certified copy of said bill. The certificate attached thereto is as follows: "I, Charles M. Bruce, secretary of the territory of Arizona, do hereby certify that the within copy is a true and complete transcript of the house bill No. 9 of the eighteenth legislative assembly of the territory of Arizona, filed in this office the 22nd day of March, A. D. 1895, at 4 o'clock P. M., as provided by law. . . ." The said certified copy of the act is the same as act No. 51, published on pages 68, 69, and 70 of the Session Laws of the eighteenth legislative assembly of the territory of Arizona. The defendant contends that when said bill passed the respective houses of the legislative assembly it had two sections (viz., sections 5 and 6) more than are in the said certified copy of said act; that said sections were omitted or stricken from the engrossed bill after the bill was passed, and before it was enrolled, and signed by the presiding officers of the two houses, and the governor. And the evidence offered by him was for the purpose of establishing that fact.

It is admitted by the counsel for defendant that the introduction of the copy of the act certified to by the secretary of the territory, as evidence, was proper, as per paragraphs 1867-1870 of the Revised Statutes of Arizona, but he contends that the journals of the respective houses of the legislative assembly may be received to show that said act is not correct. It is admitted that said certified copy is printed in the acts of the eighteenth legislative assembly. Paragraph 1867, *supra*, is as follows: "The printed statute-books of this territory, . . . shall be received as evidence of the acts . . . therein contained." It is provided in paragraph 1868: "A certified copy under the hand and seal of the secretary of the territory of any act . . . deposited in his office, in accord-

ance with law, shall be received as evidence thereof." Paragraphs 1869 and 1870 contain similar provisions. By the provisions of the foregoing paragraphs, it is clear that the certified copy of the act referred to must be received as evidence, and its provisions cannot be added to nor taken from, unless the said paragraphs are in conflict with the provisions of the constitution of the United States, or of the acts of Congress. Said paragraphs cannot be in conflict with said constitution and the acts of Congress, unless the constitution and the acts of Congress make the journals of the legislative assembly evidence of that nature that acts of said assembly may be shown to be different from the acts which have been enrolled and signed, and deposited with the secretary of the territory. By section 1844 of the Revised Statutes of the United States it is provided: "The secretary shall record and preserve all the laws and proceedings of the legislative assembly, and all the acts and proceedings of the governor in the executive department; he shall transmit one copy of the laws and journals of the legislative assembly. . . . He shall prepare the acts passed by the legislative assembly for publication and furnish a copy thereof to the public printer of the territory within ten days after the passage of such act." The officer mentioned in the statute just quoted is the secretary of the territory,—an officer appointed by the President of the United States, and one on whom, by said statute, certain official duties are imposed. It is thereby made his duty to record and preserve the laws of the legislative assembly, and to prepare the acts (laws) for publication, and to furnish copies thereof for publication. From him alone can the acts be received and published. The laws of the territory are therefore committed to his keeping, and from him, and in no other way, can they be received for publication, and be published by authority. By an act of Congress approved July 19, 1876, (1 Supp. Rev. Stats. U. S., p. 230, c. 212,) it is provided "that every bill which shall have passed the legislative council and house of representatives of the territory of Arizona shall, before it becomes a law, be presented to the governor of the territory; if he approve it, he shall sign it; but if he do not approve it, he shall return it, with his objections, to the house in which it originated, who shall enter the objections at large upon their journal, and proceed to reconsider

it. If, after such consideration, two thirds of that house shall pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law, the governor's objections to the contrary notwithstanding; but in such case the votes of both houses shall be determined by yeas and nays, and be entered upon the journals of each house respectively. . . .'' By said act of Congress, it is provided that every bill which shall have passed the legislative assembly shall, before it becomes a law, be presented to the governor. If he approves it, he must sign it. When signed by the governor, it is a law, and then it must be recorded, and preserved by the secretary, and published, etc., as specified in section 1844 of the Revised Statutes of the United States, *supra*. If a document purporting to be an act of the legislative assembly be presented to the secretary of the territory, having upon it the signature of the governor, and purporting to have been approved and signed by him as a law, the secretary may treat it as a law, and cannot resort to any other means to determine whether it is a law or not. The act under consideration is such a document. It is not necessary for us to determine what would be the duty of the said secretary in case such a document had not been approved by the governor when presented to him, and had been returned by him to the house in which it originated, with his objections. If the journals of the legislative assembly can be received in evidence, it is certain that they can be received as evidence only in cases where the bill has been returned by the governor to the house in which it originated, without his approval.

Counsel for appellant contends that certain paragraphs of chapter 4 of title 60 of Revised Statutes of Arizona make the journals of the legislative assembly evidence in this case. We have carefully examined that statute, and find nothing therein to warrant such a conclusion. That statute contains provisions directing the mode of procedure of the legislative assembly, but it contains no provisions differing materially from those contained in the acts of Congress heretofore quoted.

The courts of many of the states have decided that the journals of the legislative assemblies are proper evidence in cases similar to the one before us, while the opposite has been held by the courts of about an equal number of states. As a

rule, the courts that have held that the journals are evidence base their decisions upon the provisions of the constitutions of their respective states, and it will be observed that those provisions differ materially from the congressional acts herein cited. The acts of Congress with reference to the territories are to the territories what the constitutions are to the states. The act of Congress as to the journals, referred to, is nearly identical with the provisions of article 1, section 5, of the constitution of the United States. The supreme court of the United States, in the case of *Field v. Clark*,—a case possessing facts nearly identical with the facts in this case,—decided that the signing by the speaker of the house of representatives and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress, and when the bill, thus attested, receives the approval of the President, and is deposited in the department of state according to law, its authentication as a bill that has passed Congress is complete and unimpeachable; that it is not competent to show from the journals of either house of Congress that an act so authenticated, approved, and deposited did not pass in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495.

The question involved in this case is as to the evidence that can be introduced with reference to a bill which has passed the legislative assembly, been signed by the presiding officers of the respective houses, approved and signed by the governor, and deposited with and recorded by the secretary of the territory according to law. No question can be raised in this case with reference to a bill which had not been passed, and authenticated by the signatures of the presiding officers of the respective houses of the legislative assembly, and by the governor. A bill of that character would not become a law by any acts of the secretary of the territory. His acts are simply ministerial, with reference to all the duties required of him by the said acts of Congress, *supra*.

The only contention of the appellant in this case is, that the enrolled bill, when signed by the presiding officers and approved by the governor, had not all the parts which it had when it passed the respective houses of the legislative as-

sembly, and he contends that the journals of the respective houses are evidence in this case. The acts of Congress and the statute of Arizona referred to expressly require that certain matters shall be entered upon the journals. We need not determine what would be the effect of a failure to comply with said requirements. No such question is before us. As to matters not expressly required to be entered in the journals, they are left to the discretion of the legislative assembly. We are not advised of any rule of said legislative assembly, or either house thereof, requiring the entry of bills in full on the journals, or of the entry of amendments thereto in full on the journals. Unless the bill in question was spread upon the journals in full at the time it passed, it would not be possible to determine by the journals whether the enrolled bill was the same as the engrossed bill or not. The journals, therefore, would not be sufficient to prove the facts contended for by appellant, or to prove any fact contended for, without the aid of parol evidence. The journals of a legislative assembly, as a rule, are made up of short minute entries, framed by the clerk, in language chosen by him, without time for deliberation, which, in his judgment, he believes sufficient to express what was done. Bills and amendments thereto are usually mentioned in the journals, and noted therein, by their title and numbers. The journals, in the nature of things, must be constructed out of loose and hasty memoranda made often in the pressure of business. In the main they are kept for the benefit of the members of the body, to aid them in the discharge of their legislative duties, and that the public may be informed of the acts of the individual members. 1 Story on the Constitution, secs. 840, 841. In *Pangborn v. Young*, 32 N. J. L. 29, 37, it is said: "Can any one deny that if the laws are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation? In judging of consequences, it is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals; for it is obvious that any law can be invalidated by the interpolation of a few lines, or the obliteration of one name and the substitution of another in its stead." For a court to permit evidence to impeach an act which purports to

have passed the legislative assembly, attested by the signatures of the presiding officers of the respective houses thereof, approved and signed by the governor, and deposited with the officer who by law is the custodian thereof, without authority by constitutional provisions clearly expressed, would be to destroy the independence of one of the three co-ordinate branches of our government, and make the legislative department subordinate to the judicial. *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825.

The only other question presented is as to the constitutionality of said act. Appellant contends that it is in conflict with the provisions of the act of Congress commonly called the "Harrison Act," and for that reason void. Said act of Congress contains, among other provisions, the following, viz.: "That the legislatures of the territories of the United States . . . shall not pass local or special laws in any of the following enumerated cases, that is to say: Granting divorces. Changing the names of persons or places. Laying out, opening, altering, and working roads or highways. . . . Regulating county and township affairs. Regulating the practice in courts of justice. . . . For the punishment of crimes or misdemeanors. . . . Regulating the rate of interest on money. . . . Creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed. . . ." 24 Stats. 170. The contention is that it is in conflict with the last sentence quoted, viz., "Creating, increasing, or decreasing fees, percentage," etc. Before the act under consideration was passed, the counties of the territory were divided into three classes,—viz., first, second, and third. Said classification was based upon the number of registered voters. All counties having a certain number of voters were counties of the first class; counties having a less number of voters than what was required for a first-class county, and more than a certain designated number, were counties of the second class; and counties having a less number of voters than the number required to make a county of the second class were of the third class. During the existence of such classification, laws were enacted fixing the fees and salaries of county officers according to the said classification. As a rule, an officer of a first-class county received more than an officer of the second class, and an officer

of the second-class counties more than one of the third class. The officers of counties of one class received the same compensation,—i. e. a sheriff of one first-class county received the same compensation which was allowed the sheriffs of all other first-class counties. The act in question changed the mode of classification from the number of registered voters to the assessed valuation of the property within the counties. By it, counties having the greatest amount of property are made first-class counties. Under this act the counties of the territory are divided into six classes, and the fees and compensation of the officers of each class are uniform throughout, just as they were under the former classification. The purpose of said act of Congress is to prevent special legislation. The act under consideration is not such legislation. The judgment of the district court is affirmed.

Hawkins, J., concurs.

BAKER, C. J., concurring.—The great importance of the questions involved in this appeal must serve as an apology for outlining my views. The delicate equipoise existing between the judiciary and the legislative departments of the government, if not the integrity of the latter, and the stability of the whole body of our statute laws, are fairly within the issues presented, and in such a case it must be permissible to urge every sound reason in support of the final conclusion.

The point is, Can the journals of the legislature be introduced in evidence to contradict or nullify the enrolled bill? In other words, Is this the bill as it passed the legislature? The duty of the courts to pronounce an act void which is repugnant to the constitution must not be confounded with this inquiry. For more than a hundred years the courts of this country have not hesitated to declare an act of the legislature void when clearly in conflict with the fundamental law. 1 Kent's Commentaries, 450. And this duty does not involve any conflict between the courts and the legislature, for it is only securing to each kind of law its due authority. The conflict is really between the different kinds of law,—the constitution and the statute. Nor does the exercise of this function show that the judicial power is superior in dignity to the legislative. Cooley on Constitutional Limitations, 195. Manifestly, the legislature cannot settle the question of the

constitutionality of a statute, because it is a party interested, and must of necessity decide in its own favor. The method of determination pursued by the courts is to put the statute alongside the constitution, and the final determination is made upon the face of the two instruments. Now, the contention here is not that the bill is in conflict with some provision of the constitution, but it is that it never passed the legislature in its present form; that two material sections are omitted from the act, one of which postpones its effect until January, 1897. The proposition is to prove such omission by the journal entries. It may be conceded that to decide whether or not the journals of the legislature may be explored to determine whether or not the act passed the legislature is to declare a rule of evidence. This being so, the argument is pressed that the undisputed facts in the case show that this is not the bill passed by the legislature, and that the omissions referred to actually occurred. The parties agreed to this,—agreed that certain affidavits and exhibits attached (copies of journal entries) should be considered in evidence; and these clearly show the omission. Counsel for appellant then proceeds to argue: “The facts show that this bill was never before either house at all,—was never passed by either house,—but after a bill had passed both houses an entirely different bill was made up by some clerk of a committee and handed to the governor to sign. The bill handed to the governor is not an enrolled copy of the bill which had passed the house, hence the bill never passed at all. Here is the question presented, and here is the issue.” It is plainly to be seen that this gives the question the slip. By what authority is the admission made? Who is to defend the legislature when a private litigant is suffered to admit that it stultified itself? I will never consent that suitors may stipulate the invalidity of a statute. If the journals themselves are inadmissible to contradict the law, the admissions of the parties are equally so. If the journals are incompetent evidence, the admissions will not make them competent, and the case must be decided as if the journals were offered in evidence, and objected to in due time as incompetent. Mr. Justice Cooley declares that the courts will not act upon the admissions of parties that a bill was not passed in accordance with the constitution. Cooley on Constitutional Limitations, 163.

But to the exact point: At common law an authenticated act of parliament was conclusive and unimpeachable. "And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament; for it is a maxim in law that it requires the same strength to dissolve as to create an obligation." 1 Blackstone's Commentaries, 185, 186. "The journal is of good use for the intercourse between the two houses, and the like. When the act is passed, the journal is expired. The journals of parliament are not records, and cannot weaken or control a statute, which is a record, and to be tried only by itself." *Rex v. Arundel*, (Trinity Term) 14 Jac. Hob. 109-111. Lord Coke declared: "A record or enrollment is a monument of so high a matter, and importeth in itself such absolute verity, that, if it be pleaded there is no such record, it shall not receive trial by witnesses, jury, or otherwise, but only by itself." 2 Blackstone's Commentaries, 330. "The secretary [territories] shall record and preserve all the laws and proceedings of the legislative assembly," etc. Rev. Stats. U. S., sec. 1844. Thus, by an express statute, the acts of the legislature become a "matter of record," in a permanent and lasting form. It cannot be successfully denied but that the rule announced by these ancient authorities is the same as is understood and practiced in the English courts to-day. "The common law of England as now practiced and understood, shall, in its application to evidence, be followed and practiced by the courts of this territory, so far as the same may not be inconsistent with this act, or any other law." Rev. Stats. Ariz., par. 1862. So it may be fairly claimed that the English rule is established by statute. I am inclined also to view the effort to introduce the journal entries in this case as collateral attack upon a high record, which cannot be sustained by proof *aliunde*. *Brodnax v. Groom*, 64 N. C. 244. That a solemn record may not be assailed by evidence outside of itself is a universal doctrine in our jurisprudence. So stringent is the rule that it is not allowable to introduce a minute entry of the same court to show that a judgment was set aside. The court said: "There is no doubt of the competent power in the court to make such a rule, but the question is whether the entry of such a rule upon the minutes is to be received as evidence against the record. It appears contrary

to all well-settled technical rules upon the subject to give the entry that effect. A record imports verity, and can only be tried by itself." *Croswell v. Byrnes*, 9 Johns. 290. "The minute entry may be used to correct the judgment, but not to contradict it." *Hahn v. Kelly*, 34 Cal. 423. It cannot be well argued that the journal entries of a legislature, in their relationship to the bill, are superior to the minute entries of a court, in their relationship to the judgment. Besides, it may be inferred by the direction to keep a journal (Rev. Stats. Ariz., par. 2895) that its use is to be for the information of the legislative body alone. *Board v. Stevenson*, 46 N. J. L. 173; *Rex v. Arundel*, *supra*. The decisions in other jurisdictions greatly vary. In numbers, merely, they may preponderate in favor of the rule which accepts the journal entries in evidence. But many of these cases are inapplicable to the case at bar. They have been decided generally upon some mandatory provision of the state constitution, requiring the evidence of a compliance with the mandate to be "entered" in the journals. Thus a reason is given for the case. All such cases may be safely laid aside in this matter, for no constitutional provision is in issue, except the general requirement that all laws shall be enacted by the legislature. "An opinion in a particular case, founded on special circumstance, is not applicable to cases under circumstances essentially different." *Brooks v. Marbury*, 11 Wheat. 90. Besides, we ought not to be influenced so much by the mere numerical array which can be paraded for either side, as by the sound principles of law and just reasoning which may be embodied in the cases. It may be well to observe, also, that in the jurisdictions holding the journal entries admissible the tendency is to recede from the position. In *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882, Mr. Justice Sandels says, "The courts are gravitating towards the English rule,"—as much may be understood from *People v. Starne*, 35 Ill. 136. From the number of cases supporting the stand taken by this court, I will cite but a few in addition to those noted in the main opinion, and this is done because of the sound reasoning upon which they are based: *State v. Jones*, 6 Wash. 452, 34 Pac. 201; *Territory v. Clayton*, 5 Utah, 598, 18 Pac. 628; *Carr v. Coke*, 116 N. C. 223, 47 Am. St. Rep. 801, 22 S. E. 16. Is not there too much dynamite in the proposition

which admits the journals in evidence to contradict the enrolled bills? Is not every statutory right—rights independent of the common law, and out of which have grown valuable title, etc.—endangered when other evidence than the enrolled bill is presented to show that it is not the law? All of the laws upon our statute-book come from enrolled bills. Punishments, even of death sentence and life imprisonment, have been passed under them. If these statutes are to be questioned, and forsooth overthrown, in instances, by the loosely kept and fragmentary journals, who is so blind as not to see the result. The United States supreme court declared: “We cannot be unmindful of the consequences that must result if this court feel obliged to declare an enrolled bill, on which depends public and private interests of vast magnitude, which has been duly authenticated by the presiding officers, and deposited in the archives as an act of Congress, was not in fact passed, and therefore did not become a law.” *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495. Judge Black, in an opinion given upon a similar question, said: “I fear to turn loose a principle which might devour the whole statute-book.” Op. Attys.-Gen. U. S. Again, it must be conceded that the different courts, in determining the question, would come to different conclusions,—one holding that the statute was a law, and another holding that it was not the law. What utter confusion would arise! All are presumed to know the law,—are held to know the law; but, if their knowledge be made to depend upon the varying decisions necessarily arising from contradictory records and hastily prepared journals, the requirement will involve endless confusion and hardship. *State v. Boyce*, 140 Ind. 506, 39 N. E. 64, 40 N. E. 113. The clear-cut issue here is one of power,—of jurisdiction. The powers of the legislative and judicial departments are not merely equal. They are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. Each, within its sphere, is hedged about with the divinity of sovereignty. “The difference between the departments is that the legislature makes, and the executive executes, and the judiciary construes the law.” Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 46. “‘Judge-made law’ may be judicial tyranny. The invasion of the province of the one by the other is wholly unwarranted. The legislative and

judicial are co-ordinate departments of the government, of equal dignity. Each is alike supreme in the exercise of its proper functions, and cannot, directly or indirectly, while acting within the limits of its authority, be subject to the control or supervision of the other without an unwarrantable assumption by that other of power which, by the constitution, is not conferred on it." Judge Cooley, in *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; Cooley on Constitutional Limitations, 159. In the sense of the separate and distinct functions of these two powers, the power to make the laws carries with it the power to declare what has been done in that respect; otherwise the grant is a mockery.

"That palter with us in a double sense;
That keep the word of promise to our ear,
And break it to our hope."

To look into the journals, and give them controlling effect, is nothing less than to supervise the making of the laws. It is an indirect, but nevertheless an effective, way of doing it. And, once set in motion, where would the power end? Suppose the engrossing committee were about to insert a clause in the bill that was never enacted, and the journal clerks were about to record it; would an injunction issue to prevent the wrong? It is not so clear why this would not be done, if these entries could be subsequently considered, and given the effect of controlling the bill. Every one must see that such a course would necessarily lead to collisions between the legislative and judicial departments dangerous to the well-being of the whole body politic. It is better—safer—to mark the point where the courts are requested to consider and weigh the formulæ by which a bill is enacted, with a view to test the existence of the law itself, as the further limit of judicial power. This rule respects the distinctions existing between the two powers, and accords to the enrolled bill its just due, as being a certain and fixed test, and the highest evidence, of what the legislature has done. It is true that, under the rule announced by the decision, some forger may, for a brief while, play the rôle of a lawmaker, but that is a less evil than to turn loose in the legislative halls an unbitted and unbridled power of supervision. The succeeding legislature can undo the villainy of the forger, and, if he is caught red-handed, he can be dealt with as a criminal.

MEMORANDUM DECISIONS.

[No. 431.]

**GEORGE BRAVIN, Appellant, v. CITY OF TOMBSTONE
OF THE TERRITORY OF ARIZONA et al., Appellees.**

**APPEAL from the District Court of the First Judicial
District in and for the County of Cochise.**

William H. Barnes and John H. Martin, for Appellant.

James Reilly, for Appellees.

January 25, 1895. Dismissed.

[No. 420.]

**GUSTAVE HEYMAN et al., Appellants, v. J. F. OWEN,
Appellee.**

**APPEAL from the District Court of the Second Judicial
District in and for the County of Graham.**

E. J. Edwards, for Appellee.

January 25, 1895. Dismissed.

[Criminal No. 100.]

**HENRY BLEVINS, Appellant, v. TERRITORY OF ARI-
ZONA, Respondent.**

**APPEAL from the District Court of the Second Judicial
District in and for the County of Gila. Owen T. Rouse,
Judge.**

E. J. Edwards, for Respondent.

January 28, 1895. Reversed.

[Criminal No. 103.]

WALTER STEINBROOK, Appellant, v. TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge.

J. W. Wright, for Appellant.

Thomas B. Satterwhite, Attorney-General, for Respondent.

January 28, 1895. Affirmed.

[Civil No. 463.]

R. C. WOODRUFF, as Cashier of the Prescott National Bank, a Corporation, Appellant, v. YAVAPAI COUNTY, IN THE TERRITORY OF ARIZONA, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

Herndon & Norris, Charles W. Wright, for Appellant.

Robert E. Morrison, District Attorney, for Appellee.

January 30, 1895. Reversed.

[Civil No. 464.]

FLORENCE PUBLISHING COMPANY, Appellant, v. ROBERT WILLIAMS, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

E. J. Edwards, for Appellee.

January 31, 1895. Dismissed.

[Civil No. 448.]

LUTHER WILSON, Appellant, v. JAMES R. LOWRY et al., Appellees.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge.

James H. Wright, for Appellant.

Herndon & Norris, for Appellees.

January 31, 1895. Affirmed.

[Criminal No. 93.]

WILLIAM JACKSON and W. J. MAUPIN, Appellants, v. TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Apache. J. J. Hawkins, Judge.

J. F. Wilson, and W. H. Burbage, for Appellants.

Francis J. Heney, Attorney-General, and T. G. Norris, for Respondent.

February 23, 1895. Reversed.

[Civil No. 389.]

J. D. KINNEAR, Plaintiff, v. JENNIE KINNEAR et al., Defendants and Appellees. WILLIAM SKINNER, Intervenor and Appellant.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. Richard E. Sloan, Judge.

W. H. Barnes, for Appellant.

William Herring, for Appellees.

February 23, 1895. Affirmed.

[Civil Nos. 421, 422.]

**THE SILVER KING MINING COMPANY, Appellant, v.
JESSE BROWN, Appellee.**

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

Kibbey & Israel, for Appellant.

E. J. Edwards, and H. B. Summers, for Appellee.

February 23, 1895. Affirmed.

[Civil No. 435.]

**E. J. BENNITT, Appellant, v. BRUCE PERLEY, Admin-
istrator of the Estate of C. D. Stevens, Deceased, and
P. S. PERLEY, Appellees.**

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

C. F. Ainsworth, for Appellant.

P. S. Perley, for Appellees.

February 23, 1895. Affirmed.

[Civil No. 440.]

**GILA COUNTY, Appellant, v. J. H. THOMPSON et al.,
Appellees.**

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

Cox & Street, for Appellant.

E. J. Edwards, W. H. Barnes, and Joseph Campbell, for Appellees.

February 23, 1895. Affirmed.

[Civil No. 442.]

JOHN DUKE, Appellant, v. W. H. FERGUSON, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

T. W. Johnston, for Appellant.

J. F. Wilson, for Appellee.

February 23, 1895. Affirmed.

[Civil No. 444.]

ANNIE CADMAN, Administratrix of the Estate of John Cadman, Deceased, Appellant, v. THE OLD DOMINION COPPER COMPANY, a Corporation, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

Barnes & Martin, and Peter T. Robertson, for Appellant.

Fitch & Campbell, and E. J. Edwards, for Appellee.

February 23, 1895. Dismissed.

[Civil No. 447.]

M. D. SCRIBNER, Appellant, v. COUNTY OF COCHISE, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. J. D. Bethune, Judge.

Allen R. English, for Appellant.

Thomas D. Satterwhite, Attorney-General, and G. W. Swain, for Appellee.

February 23, 1895. Affirmed.

[Civil No. 451.]

UNITED VERDE COPPER COMPANY, Appellant, v. A. G. OLIVER, Treasurer and Ex Officio Tax-Collector, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge.

Herndon & Norris, for Appellant.

Thomas D. Satterwhite, Attorney-General, and R. E. Morrison, for Appellee.

February 23, 1895. Affirmed.

[Civil No. 460.]

JOHN T. JONES, Defendant in Error, v. J. K. MURPHY et al., Plaintiffs in Error.

ERROR from District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

C. F. Ainsworth, for Plaintiffs in Error.

J. B. Woodward, and H. C. Mange, for Defendants in Error.

February 23, 1895. Affirmed.

[Civil No. 465.]

JUAN FLORES, Appellant, v. HENRY S. KEMP et al., Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

G. B. Gordon, and J. F. Moriarty, for Appellant.

C. F. Ainsworth, for Appellees.

July 8, 1895. Dismissed.

[Civil No. 490.]

J. E. PETERS, Appellant, v. THE PHOENIX NATIONAL
BANK, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

J. B. Woodward, for Appellant.

L. H. Chalmers, for Appellee.

July 9, 1895. Affirmed.

[Civil No. 343.]

In re Estate of JOHN D. WALKER, Deceased, Appellant,
v. A. J. DORAN, Appellee.

APPEAL from the District Court of the Second Judicial
District in and for the County of Pinal. Joseph H. Kibbey,
Judge.

Fitch & Campbell, for Appellant.

Barnes & Martin, and S. M. Franklin, for Appellee.

July 10, 1895. Affirmed.

[Civil No. 441.]

EDWARD H. COOK et al., Appellants, v. GILA COUNTY,
Appellee.

APPEAL from the District Court of the Second Judicial
District in and for the County of Gila. Owen T. Rouse,
Judge.

Cox & Street, for Appellants.

E. J. Edwards, for Appellee.

July 10, 1895. Affirmed.

[Civil No. 466.]

JOSEPH B. SCOTT, Appellant, v. COUNTY OF PIMA,
Appellee.

APPEAL from the District Court of the First Judicial
District in and for the County of Pima. J. D. Bethune,
Judge.

Barnes & Martin, for Appellant.

William M. Lovell, District Attorney, for Appellee.

July 10, 1895. Affirmed.

[Civil No. 467.]

H. W. RYDER, Appellant, v. HENRY RIXON, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

J. B. Early, for Appellant.

Alexander & Stilwell, for Appellee.

July 10, 1895. Affirmed.

[Civil No. 446.]

W. A. DAGGS et al., Appellants, v. HUGH McCRUM, Ap-
pellee.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Coconino. J. J. Hawkins,
Judge.

R. E. Sloan, L. H. Chalmers, H. Z. Zuck, A. J. Daggs, and
P. B. McCabe, for Appellants.

Herndon & Norris, for Appellee.

July 10, 1895. Affirmed.

[Civil No. 461.]

JAKE MARKS, Appellant, v. SAN FRANCISCO BREWERIES COMPANY LIMITED, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge.

Herndon & Norris, for Appellant.

T. W. Johnston, and L. M. Hoefler, for Appellee. Garber, Boalt & Bishop, of Counsel.

July 30, 1895. Affirmed.

[Civil No. 462.]

FRED G. BRECHT, Appellant, v. SAN FRANCISCO BREWERIES COMPANY LIMITED, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge.

Herndon & Norris, for Appellant.

T. W. Johnston, and L. M. Hoefler, for Appellee. Garber, Boalt & Bishop, of Counsel.

July 10, 1895. Affirmed.

[Civil No. 473.]

ANNIE CADMAN, Administratrix of the Estate of John Cadman, Deceased, Plaintiff in Error, v. THE OLD DOMINION COPPER COMPANY, a Corporation, Defendant in Error.

WRIT OF ERROR from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

Barnes & Martin, for Plaintiff in Error.

Fitch & Campbell, for Defendant in Error.

July 10, 1895. Dismissed.

[Civil No. 432.]

In re Guardianship of the Persons and Estate of AARON HUGO and HELENITA ZECKENDORF, formerly Minors, Appellees, v. LOUIS ZECKENDORF, Appellant.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. Richard E. Sloan, Judge.

Affirmed. 171 U. S. 686, 19 S. C. Rep. 882, 43 L. Ed. 1179.

Heney & Ford, for Appellant.

S. M. Franklin, for Appellees.

July 10, 1895. Reversed.

[Civil No. 489.]

J. D. REYMERT, Appellant, v. PETER JOHNSON, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. Owen T. Rouse, Judge.

Joseph Campbell, for Appellee.

July 10, 1895. Affirmed.

[Civil No. 480.]

C. L. RIGDON et al., Appellants, v. J. J. COTTRELL, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

J. B. Early, and F. H. Lyman, for Appellants.

Millay & Bennett, for Appellee.

July 11, 1895. Affirmed.

[Civil No. 492.]

D. TOOKER, v. VIRGINIA GOLD MINING COMPANY,
a Corporation,

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. Owen T. Rouse, Judge.

Herndon & Norris, for Appellee.

July 11, 1895. Affirmed.

[Civil No. 488.]

WILLIAM JACKSON, Appellant, v. J. E. WALKER, Clerk
of the District Court of Maricopa County, Third Judicial
District of the Territory of Arizona, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

J. B. Woodward, for Appellant.

Fitch & Campbell, for Appellee.

July 11, 1895. Dismissed.

[Civil No. 411.]

THE CALIFORNIA BRIDGE COMPANY, Plaintiff in
Error, v. GEORGE PUSH et al., Defendants in Error.

WRIT OF ERROR from the District Court of the Third Judicial District in and for the County of Maricopa. H. C. Gooding, Judge.

Street & Frazier, for Plaintiff in Error.

Fletcher M. Doan, and Selim M. Franklin, for Defendants
in Error.

July 12, 1895. Dismissed.

[Civil No. 491.]

PETER BOWEN, Appellant, v. BANK OF BRITISH COLUMBIA, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

J. B. Woodward, for Appellant.

Joseph Campbell, for Appellee.

July 12, 1895. Affirmed.

[Civil No. 493.]

NERI OSBORN, Appellant, v. THE CENTRAL AVENUE DRIVING ASSOCIATION, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

C. F. Ainsworth, for Appellee.

July 12, 1895. Affirmed.

[Criminal No. 107.]

RAMON ESCAROSA, Appellant, v. UNITED STATES OF AMERICA, Respondent.

APPEAL from the District Court of the First Judicial District. J. D. Bethune, Judge.

Frank H. Hereford, for Appellant.

E. E. Ellinwood, United States District Attorney, for Respondent.

July 13, 1895. Affirmed.

[Civil No. 434.]

LOTTIE WEINMAN, Appellant, v. DANIEL MURPHY et al., Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

C. F. Ainsworth, and J. M. Burnett, for Appellant.

Barnes & Martin, for Appellees.

July 13, 1895. Reversed.

[Civil No. 478.]

JESUS MIRANDA, Administrator et al., Appellants, v. CHARLES GOLDMAN and LEO GOLDMAN, Co-partners under the firm name of Goldman & Co., Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

Cox & Street, Dameron & Crenshaw, and J. B. Woodward, for Appellants.

Fitch & Campbell, for Appellees.

July 13, 1895. Affirmed.

[Civil No. 468.]

THE ATLANTIC AND PACIFIC RAILROAD COMPANY, Plaintiff in Error, v. THE DEFIANCE CATTLE COMPANY, Defendant in Error.

WRIT OF ERROR from the District Court of the Fourth Judicial District in and for the County of Apache. J. J. Hawkins, Judge.

C. N. Sterry, for Plaintiff in Error.

J. F. Wilson, for Defendant in Error.

July 15, 1895. Affirmed.

[Civil No. 486.]

C. E. CROWLEY, Petitioner, v. THE DISTRICT COURT
OF MARICOPA COUNTY and THE HONORABLE
A. C. BAKER, the Judge of said Court, Respondent.

ORIGINAL APPLICATION for Writ of Mandamus.

C. F. Ainsworth, for Petitioner.

Thomas Armstrong, Jr., for Respondent.

July 15, 1895. Writ denied.

[Civil No. 390.]

ADOLPH COHN, Appellant, v. A. J. MEHAN et al., Ap-
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APPEAL from the District Court of the First Judicial
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W. H. Barnes, M. A. Smith, and William C. Stahle, for Ap-
pellant.

James Reilly, and Allen R. English, for Appellees.

July 31, 1895. Affirmed.

[Criminal No. 105.]

JOSÉ MARIA SORTILLON, Appellant, v. UNITED
STATES OF AMERICA, Respondent.

APPEAL from the District Court of the Third Judicial
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Kibbey & Israel, for Appellant.

E. E. Ellinwood, United States District Attorney, for Re-
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[Civil No. 484.]

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HAWKINS, J., and ROUSE, J., concurring specially.

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CONTRACTS.

1. CONTRACT—CONSTRUCTION—RULE OF CONFINED TO CASES OF DOUBT.—The term "rule of construction" is confined by general usage to rules for the interpretation of written documents in matter on which, in the absence of a rule to aid, there might be a doubt. (Mutual Life Ins. Co. v. Arhelger, 271.)
2. CONTRACT—CONVEYANCE OF LAND—EVIDENCE—DEFAULT OR RESCISSION—SALE TO THIRD PARTIES AND STATEMENT THAT CONTRACT IS FORFEITED SUFFICIENT EVIDENCE OF RESCISSION.—Plaintiff and defendant entered into a contract whereby defendant was to secure title to certain land and deed same to plaintiff for fourteen thousand dollars. Plaintiff was to pay two thousand five hundred dollars to defendant as part payment, which was duly paid, the balance to be paid when title was acquired and conveyed to plaintiff. Plaintiff stood ready to pay for a considerable time, and then urged defendant to sell his interest, as he did not wish to hold his money idle while defendant was procuring title. Later, when defendant had procured title, plaintiff asked defendant to sell the land or deed him a *pro rata* for the amount paid. This request defendant refused, but offered to take the two thousand five hundred dollars already paid, cancel the contract, and keep the land. Plaintiff asked for a few days to consider the proposition. This ended negotiations, and two months later defendant sold the land to other parties. Plaintiff then wrote defendant that he had been informed that defendant claimed he had forfeited his contract, and protested he had not, to which defendant answered that he considered the contract forfeited from the time of the last negotiations. Under the evidence as stated, the case does not turn upon whether plaintiff or defendant was in default in carrying out the terms of their contract, but upon the question whether the contract was rescinded and by whom. The sale of the land by defendant, with his admission

CONTRACTS (Continued).

that he considered the contract forfeited, is sufficient evidence of a rescission by him. (Christy v. Arnold, 263.)

3. **SAME—SAME—FORFEITURES.**—Where a contract does not contain any provision that the amount paid shall be held as a forfeit in case of default of the vendee in the completion of his contract, none can be enforced. (Christy v. Arnold, 263.)
4. **SAME—SAME—RESCISSION—RECOVERY OF MONEY PAID.**—The effect of the rescission of the contract by defendant, even if plaintiff was in default, was to render the former liable for the return of the two thousand five hundred dollars received by him from the latter. (Christy v. Arnold, 263.)
5. **SAME—SAME—PLEADING—RECOUPMENT—REV. STATS. ARIZ. 1887, PARS. 736, 737, 742, CONSTRUED.**—An answer to a complaint for the recovery of a part payment on a contract rescinded by defendant, averring that the part payment had profited defendant nothing, is not such a pleading as to entitle defendant to prove and be allowed damages as a set-off to plaintiff's demand, as the statutes, *supra*, require defendant to set up his counterclaim based on such damage, and state therein distinctly the nature of the damage sustained, so that the plaintiff can have "full notice of the character thereof." (Christy v. Arnold, 263.)
6. **CONTRACT—PLEADING—FAILURE TO PERFORM CONDITIONS—MUST BE RAISED BY ANSWER—ADMISSION BY FAILURE TO PLEAD.**—In an action upon a contract, the complaint alleging performance of all its conditions, and the answer being a special denial, to avail himself of a breach of a certain condition, the defendant should have denied in his answer that the same had been fulfilled, or specially pleaded the same as matter of defense; otherwise, the allegation of the complaint, not being controverted, will be taken as admitted. (Evans v. Glencross, 222.)
7. **SAME—CONDITIONS—PERFORMANCE—WAIVER—FACT FOR JURY.**—Whether a contract has been performed or its performance waived, is usually a question of fact for the jury. (Evans v. Glencross, 222.)
See Cropper's Contract, 1, 2, 3; Mines and Mining, 1, 2; Public Lands, 1.

CONTRIBUTORY NEGLIGENCE. See Negligence, 1, 2; Personal Injuries, 1.

CONVEYANCE OF LAND. See Contract, 2.

CORPORATIONS.

1. **CORPORATIONS—OFFICERS—SALARIES—POWER OF DIRECTORS TO VOTE THEMSELVES SALARIES—RATIFICATION.**—A resolution by a quorum of the board of directors of a corporation, voting one of their

CORPORATIONS (Continued).

number, whose vote was necessary to its passage, a salary as secretary, is void, unless ratified by the shareholders in an unequivocal, clear, substantive act, done in full view of the material facts. (Martin v. Santa Cruz etc. Co., 171.)

2. **SAME—RESOLUTION OF DIRECTORS CONCERNING SALARIES TO MEMBERS OF BOARD—RATIFICATION—KNOWLEDGE BY STOCKHOLDERS INSUFFICIENT.**—The subsequent ratification at a stockholders' meeting of another resolution, passed at the same meeting as the resolution fixing the salary of the secretary, does not constitute a ratification of the salary; nor does the fact that the minutes of the meeting containing the objectionable resolution were before the stockholders in itself convey any idea of the ratification. (Martin v. Santa Cruz etc. Co., 171.)
3. **SAME—SAME—SAME—RESOLUTION BY DIRECTORS INCREASING SALARY NOT A RATIFICATION.**—A resolution to increase the salary of secretary passed by the board of directors composed in part of the directors who voted for the obnoxious resolution will not be treated as a ratification, even if they could ratify their own illegal act. (Martin v. Santa Cruz etc. Co., 171.)
4. **CORPORATIONS—VALIDITY OF LAW INCORPORATING—WHO MAY QUESTION.**—One will not be suffered to obtain goods of another, doing business as a corporation, and, retaining the goods, defeat a recovery by alleging the illegality of the act under which the corporation was formed. (Agua etc. Co. v. Bashford-Burmister Co., 203.)
5. **SAME—MERCANTILE PURPOSES—REV. STATS. ARIZ. 1887, TIT. XII, CHAP. 2, NOT IN CONFLICT WITH REV. STATS. U. S., SEC. 1889—INDUSTRIAL PURSUITS.**—The act of the territorial legislature, *supra*, authorizing the formation of corporations for mercantile purposes, is not in conflict with section 1889 of the Revised Statutes of the United States, *supra*, the term "mercantile business" being embraced in the words "industrial pursuits," as used in said statute. (Agua etc. Co. v. Bashford-Burmister Co., 203.)

COUNTERCLAIM.

1. **COUNTERCLAIM—RECOUPMENT—REV. STATS. ARIZ. 1887, PARS. 736, 737, 742, CONSTRUED.**—Counterclaim as used in statutes, *supra*, embraces recoupment. (Christy v. Arnold, 263.)

COUNTY.

Does not have to file appeal-bond. See Appeal and Error, 16, 18.

COUNTY CHARGE. See Office and Officers, 3, 4.

COUNTY OFFICERS.

1. **COUNTY OFFICERS—CLERK OF BOARD OF SUPERVISORS—ELECTION—REV. STATS. ARIZ. 1887, PAR. 390, CITED—HOLDS OFFICE AT PLEAS-**

COUNTY OFFICERS (Continued).

URE OF BOARD—REV. STATS. ARIZ. 1887, PAR. 3049, CITED.—The clerk of the board of supervisors is elected by the board of supervisors. Par. 390, *supra*, cited. The office is held at the will of the board. They can remove one and appoint one at pleasure. Par. 3049, *supra*, cited. (Hawke v. Wentworth, 317.)

2. SAME—BOARD OF SUPERVISORS—QUALIFICATION OF MEMBERS—RIGHT TO OFFICE—POWER OF BOARD TO DETERMINE—JURISDICTION OF DISTRICT COURT—REV. STATS. ARIZ. 1887, TIT. 62, CITED.—Members of a board of supervisors have no authority to pass upon the question of a co-member's title to or qualifications for the office. Those questions can only be determined by the district court in proceedings instituted therein for that purpose. Statute, *supra*, cited. (Hawke v. Wentworth, 317.)
3. SAME—SAME—VACANCY—HOW FILLED—REV. STATS. ARIZ. 1887, PAR. 388, CITED.—A vacancy caused by the resignation of a member of the board of supervisors can only be filled by an election by the remaining supervisors and the probate judge. Statute, *supra*, cited. (Hawke v. Wentworth, 317.)

COUNTY RECORDER. See Office and Officers, 3.

COUNTY TAX-COLLECTOR. See Office and Officers, 4.

COURTS.

1. COURTS—DUTY—PEACE—SHOULD PRESERVE WHERE BREACH THREATENED IN REGARD TO MATTERS WITHIN THEIR JURISDICTION AND CONTROL.—The judiciary, having jurisdiction of a matter, should use the authority vested in it to prevent continuance of acts which tend to impair the credit of the county and constitute a breach of the peace. (Hawke v. Wentworth, 317.)
2. COURTS—TERRITORIAL—CASES ARISING UNDER UNITED STATES LAWS—REV. STATS. U. S., SEC. 1910, CITED—JURISDICTION—ATTENDANCE OF WITNESSES FOR INDIGENT DEFENDANTS—REV. STATS. U. S., SEC. 878, CONSTRUED—PAYMENT.—Under section 1910, *supra*, conferring upon the territorial courts the same jurisdiction in all cases arising under the constitution and the laws of the United States as is vested in the circuit and district courts of the United States, in a criminal case arising under the laws of the United States the court has power to make an order for the attendance of witnesses in behalf of indigent defendants, and it is the duty of the United States to furnish means for the attendance of such witnesses. Section 878, *supra*, construed. (United States v. Falshaw.)

See Mexican Grants, 1, 2, 3.

CRIMINAL LAW.

1. CRIMINAL LAW—AGGRAVATED ASSAULT—INSTRUCTIONS—PREMEDITATED DESIGN—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 390, SUBD.

CRIMINAL LAW (Continued).

- 6, CITED.—An instruction that if the defendant made an assault upon the complaining witness with a deadly weapon, the jury might find him guilty of an aggravated assault is error, it failing to include the element of "premeditated design" necessary to constitute the offense under statute, *supra*. (Territory v. Hancock, 154.)
2. SAME—SAME—SAME—READING STATUTORY DEFINITION—UNITED STATES V. ROMERO, *Post*, p. 193, FOLLOWED.—The reading of the statute defining the offense does not cure an erroneous instruction as to the elements of the crime. *United States v. Romero, supra*, followed. (Territory v. Hancock, 154.)
3. SAME—INSTRUCTIONS—READING STATUTE—RELEVANCY TO EVIDENCE—MISLEADING.—The reading of the whole section of the statute defining seven different circumstances under which a crime may be committed, many of which have no reference whatever to the evidence in the case, is error, as instructions should have some reference to the case made by the evidence; otherwise, they are calculated to confuse and mislead. (Territory v. Hancock, 154.)
4. CRIMINAL LAW—APPEAL—NOTICE OF APPEAL—REV. STATS. 1887, PENAL CODE, PAR. 1866, CONSTRUED.—Under statute, *supra*, written notice of appeal in a criminal proceeding must be filed with the clerk of the trial court to confer jurisdiction upon this court. A verbal notice of appeal given in open court and entered upon the minutes is insufficient. (Territory v. Hunter, 198.)
5. SAME—SAME—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1866—"STAYING" MISPRINT FOR "STATING."—In the statute, *supra*, reading: "An appeal to the supreme court of the territory is taken by filing with the clerk of the court, in which the judgment or order appealed from is entered or filed, a notice *staying* the appeal from the same," the word "staying" as printed is evidently a misprint of the word "stating." (Territory v. Hunter, 198.)
6. CRIMINAL LAW—APPEAL AND ERROR—NEW TRIAL—CONFLICT IN EVIDENCE.—Where the evidence is ample to sustain the verdict, though evidence should be embodied in a bill of exceptions. (Territory v. Montez, 179.)
7. SAME—SAME—RECORD—BILL OF EXCEPTIONS—ADMISSION AND REJECTION OF EVIDENCE.—Errors in the admission or rejection of evidence should be embodied in a bill of exceptions. (Territory v. Miramontez, 179.)
8. CRIMINAL LAW—BURGLARY—EVIDENCE—SUFFICIENCY.—Evidence on a trial of appellants, three Booth brothers, jointly indicted for burglary, that flour stored in a house was taken without the owner's knowledge or consent; that a cart with flour scattered over it had been tracked from where the flour had been stolen to the gate of the father of appellants; that flour was seen stacked up in the house of the father; that Zack Booth was seen there shortly after; that on

CRIMINAL LAW (Continued).

the night of the burglary the appellants were in town, and two of the brothers spent the night at their homes, but Zack was away some three hours, and afterwards "joshed" about having taken the flour, and told one witness but one man knew anything about it, and threatened witness that he would do him up if he said anything about what had been talked of, is sufficient to justify the jury in convicting Zack Booth. (Territory v. Booth, 148.)

9. SAME—SAME—JOINT INDICTMENT — EVIDENCE — SUFFICIENCY AS TO ONE AND WANT OF EVIDENCE AS TO OTHERS.—Where the evidence is sufficient to support a verdict of conviction as against one of three brothers jointly indicted for the crime of burglary, but there is no evidence connecting either of the others with the commission of the offense, the judgment of the trial court will be affirmed as to the one, and reversed and the case remanded for a new trial as to the others. (Territory v. Booth, 148.)
10. CRIMINAL LAW—CHARGE TO JURY—APPEAL AND ERROR—RECORD—NO DUTY TO CHARGE UNLESS REQUESTED—REV. STATS. ARIZ. 1887, PENAL CODE, PARS. 1677, 1679, CITED.—Where the record is silent on the subject of charge to the jury, except that it contains a paper entitled in the cause, being in the form of a charge, but which was not placed in the record in any way, it cannot be considered. As the law does not make it the duty of the court to charge the jury unless requested as provided in paragraphs 1677 and 1679, *supra*, the court did not err in refusing to grant a new trial for errors in charging the jury. (United States v. Chung Sing, 217.)
11. CRIMINAL LAW—CONSPIRACY TO COMMIT MISDEMEANOR—REV. STATS. ARIZ. 1887, PEN. CODE, PARS. 266, 1654, CITED—AGREEMENT—OVERT ACT.—In a charge of conspiracy the corrupt agreement is usually the gravamen of the offense, but in a trial for conspiracy to commit a misdemeanor, under the statutes (pars. 266, 1654, *supra*), it is necessary to prove the corrupt agreement and one or more of the criminal acts charged before it becomes a conspiracy. (Territory v. Turner, 290.)
12. SAME—SAME—EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR—FOUNDATION.—Conspiracy should be first established *prima facie* before the acts and declarations of a co-conspirator can be admitted in evidence against another. (Territory v. Turner, 290.)
13. SAME—SAME—KILLING CATTLE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 973, AS AMENDED, LAWS 1889, P. 21—EVIDENCE—WHETHER DEFENDANT BUTCHER MATERIAL—STATUTE CREATING MISDEMEANOR STRICTLY CONSTRUED.—In a prosecution for conspiracy to commit a misdemeanor by killing cattle for sale, defendants being persons not engaged as butchers, and not retaining in their possession the hides for twenty-one days as required by statute, *supra*, the fact as to whether defendants were butchers is material, and must be

CRIMINAL LAW (Continued).

proved. The overt act charged is a statutory misdemeanor, and such statutes are strictly construed. (Territory v. Turner, 290.)

14. **SAME—SAME—EVIDENCE—PROOF OF OVERT ACT BY TWO PERSONS INSUFFICIENT.**—Mere proof of the commission of a misdemeanor by two or more persons is insufficient to sustain a conviction for conspiracy to commit such misdemeanor. (Territory v. Turner, 290.)
15. **CRIMINAL LAW—GENERAL REPUTATION—EVIDENCE—LIMITED TO TRAIT INVOLVED IN THE CHARGE.**—In a trial for disposing of ardent spirits to an Indian, objections to questions as to the reputation of defendant being a law-abiding citizen are properly sustained, the questions propounded not having been put in form to secure answers to defendant's general reputation in the trait involved in the charge against him. (United States v. Chung Sing, 217.)
16. **CRIMINAL LAW—GRAND JURY—HOW SUMMONED—REV. STATS. ARIZ. 1887, PARS. 2184, 2196, CITED AND CONSTRUED.**—The Revised Statutes of Arizona, paragraph 2184, *supra*, provides that the judge "may, in his discretion, order drawn a grand jury from the regular list." Paragraph 2196, *supra*, provides that "where jurors are not drawn and summoned in the manner hereinbefore prescribed to attend any district court, or a sufficient number fail to appear, such court may, in its discretion, order a sufficient number to be drawn forthwith and summoned to attend said court; or it may, by an order entered on its minutes, summon as many to serve as grand or trial jurors as the case may require." A grand jury, summoned by an order of court, on the application of the district attorney, from the body of the county, is within the provisions of the statutes and legal. (Territory v. Chartz, 4.)
17. **SAME—JURORS—CHALLENGES—APPEAL AND ERROR—RECORD MUST DISCLOSE INJURY—HARMLESS ERROR.**—Where error is predicated upon the refusal of the trial court to sustain a challenge to a juror, the record should disclose that the defendant exhausted his peremptory challenges upon the panel, and that he was compelled to exercise one of them upon the objectionable juror; otherwise, it must be presumed that the defendant was not injured. (Territory v. Chartz, 4.)
18. **SAME—SAME—DISQUALIFIED—BIAS AND PREJUDICE—UNKNOWN AT TRIAL—GROUND FOR NEW TRIAL.**—When it clearly appears that a juror was disqualified by reason of bias or prejudice, and the fact of his disqualification was not known until after the trial it is the duty of the court to grant a new trial, especially when the juror may have been examined as to his qualification, and failed to disclose the fact which disqualified him. (Territory v. Chartz, 4.)
19. **SAME—SAME—SAME—SAME—FACTS SHOWING—NEW TRIAL GRANTED.**—In a murder trial, when a juror has upon his *voir dire* qualified, but it is shown afterward by affidavit that prior to the trial he

CRIMINAL LAW (Continued).

had used the following language to affiant: "That there are so many married men whose wives are loose characters, and single men will get around them, and get the best of them, and their husbands will make gun-plays," and that he did not believe in it, and from what he had heard and read about the case he was satisfied that the defendant was guilty, and it is further shown that defendant had no knowledge of these facts prior to the trial, the juror was disqualified, and a new trial should be granted. (Territory v. Chartz, 4.)

20. SAME—SAME—SAME—NEW TRIAL—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1759, CONSTRUED.—Section 1759 of the Penal Code, *supra*, though not especially mentioning the disqualification of a trial juror as a ground for new trial, after enumerating the various causes, provides for cases, "where any good cause exists other than those in this section enumerated," and is broad enough to include a case of this character. (Territory v. Chartz, 4.)
21. CRIMINAL LAW—INDICTMENT—ASSAULT WITH INTENT TO COMMIT MURDER—ASSAULT WITH A DEADLY WEAPON—SUFFICIENCY OF INDICTMENT FOR FORMER CRIME TO CONSTITUTE GOOD INDICTMENT FOR LATTER.—Where appellant was tried under an indictment for assault with intent to commit murder, and the crime of assault with a deadly weapon was charged therein under the general designation of a "felony," and the kind of instrument or weapon with which the assault was made was therein fully described, and the mode in which it was used, so that, as a matter of law, said weapon, as described and used, was a deadly weapon, such indictment charges the appellant with the crime of assault with a deadly weapon as fully as if the pleader has added thereto the particular name of the offense, by setting it out in the indictment in the exact language of the statute. (Territory v. West, 212.)
22. SAME—SAME—ASSAULT WITH INTENT TO COMMIT MURDER—ASSAULT WITH DEADLY WEAPON—LATTER NOT PART OF FORMER OFFENSE—WHEN LATTER OFFENSE FULLY CHARGED IN INDICTMENT FOR FORMER CONVICTION FOR LATTER WILL BE SUSTAINED.—Though the crime of assault with a deadly weapon is not a part of the crime of assault to commit murder, if in the indictment charging the last-mentioned offense the former is fully charged, a conviction for the former offense thereunder would be valid. (Territory v. West, 212.)
23. CRIMINAL LAW—INDICTMENT—ASSAULT WITH INTENT TO COMMIT MURDER—ASSAULT WITH DEADLY WEAPON—SUFFICIENCY OF INDICTMENT FOR FORMER OFFENSE TO SUSTAIN CONVICTION FOR LATTER—WEST V. TERRITORY, ANTE, P. 212, FOLLOWED.—In an indictment charging appellant with "an assault to commit murder" the crime was designated "felony," and the kind of instrument or weapon with which the assault was made was described, and the mode and manner in which it was used. As described and used, the weapon

CRIMINAL LAW (Continued).

- was a deadly weapon. Under the indictment, a verdict was properly returned finding appellant guilty of an assault with a deadly weapon. Following *West v. Territory, supra*. (Territory v. Evans, 257.)
24. CRIMINAL LAW—INSTRUCTIONS—DUTY OF COURT TO INSTRUCT.—On the trial of a murder case, evidence having been admitted of conversations between other persons, in the absence of the defendant, on the theory of conspiracy, without which evidence there was nothing to support a verdict of guilty, and defendant's request for an instruction defining "conspiracy" having been refused as faulty, the court should have instructed the jury as to what constitutes "conspiracy." (United States v. Wilson, 108.)
25. CRIMINAL LAW — MURDER — INSTRUCTION — DEFINITION — MALICE AFORETHOUGHT.—An instruction in a trial for murder under the United States laws, that if the deceased Indian was found dead in the judicial district on or about the twenty-eighth day of December, 1891, and the jury believe from the evidence beyond a reasonable doubt, that the defendant, after the death of the Indian, told witnesses that he had killed her, such statement would warrant them in finding the defendant guilty as charged in the indictment, is error, it omitting the principal ingredient of all murder,—malice aforethought. (United States v. Romero, 193.)
26. SAME—SAME—SAME—READING STATUTORY DEFINITION.—Conceding that the territorial statute is substantially the same as the common-law definition of murder, the mere reading of the statute does not cure the defect in the above instruction. (United States v. Romero, 193.)
27. SAME—SAME—SAME—REASONABLE DOUBT — MISLEADING. — An instruction that, "if you should find that you have not an abiding conviction, to a moral certainty, of the truth of the charge against the defendant, you have such a reasonable doubt that will warrant you in returning a verdict of not guilty; otherwise, you have not a reasonable doubt that will warrant an acquittal," is error, being confusing and misleading. Citing *Territory of Arizona v. Barth*, 2 Ariz. 319, 15 Pac. 673. (United States v. Romero, 193.)
28. CRIMINAL LAW—NECESSITY FOR PLEA.—Until the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment even after verdict. (Territory v. Blevins, 68.)
29. CRIMINAL LAW—RAPE—EVIDENCE—SUFFICIENCY.—Evidence upon a prosecution for rape by a father sixty years of age upon a daughter aged eighteen, showing that the parties resided in the same dwelling, and had adjoining bedrooms, with a door from one to the other, for nearly twelve months before the time of the alleged assault; that it was first committed in the daytime, on Sunday, when people were abroad; that after the first act, at intervals of two or three

CRIMINAL LAW (Continued).

days, it was repeated, and that at each time she exclaimed, "Father, have mercy on your own flesh and blood!" that after the completion of the first act she resumed her household duties, and there was no apparent change in the relations between them; that a month after the alleged assault he purchased her a gold watch and chain and presented it to her four days before his arrest, is insufficient to support a conviction. (*Curby v. Territory*, 371.)

BETHUNE, J., dissenting.

30. SAME—SAME—SAME—DEFENSE—MOTIVE OF PROSECUTING WITNESS.—It is competent for the defense to show, on a prosecution for rape, that the prosecutrix was actuated by a motive, which was to shield her lover, whose attentions were paid to her against defendant's consent. (*Curby v. Territory*, 371.)
31. SAME—EXAMINATION OF DEFENDANT—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 2040, CITED.—A defendant can only be examined by the prosecution about the matters testified to in his direct examination. Statute, *supra*, cited. (*Curby v. Territory*, 371.)
32. SAME—RAPE—EVIDENCE—UNCORROBORATED TESTIMONY OF PROSECUTRIX SUFFICIENT.—A conviction for rape can be had on the uncorroborated testimony of the woman ravished. (*Curby v. Territory*, 371.)
33. SAME—SAME—SAME—REPETITION OF ACT—CONSENT.—If, after the first act is accomplished, it be repeated at intervals, and the woman is of the age of discretion, and has the opportunity to make complaint, and she makes none, or if she consents to an act after the first intercourse, such conduct will be evidence that the first act was performed with her consent, and she was not ravished. (*Curby v. Territory*, 371.)
34. CRIMINAL LAW—TRIAL—READING INDICTMENT AND PLEA TO JURY—NOT JURISDICTIONAL—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1643, CONSTRUED—FAILURE TO READ MAY BE WAIVED.—The reading of the indictment and the stating of the plea to the jury by the clerk, though directed by statute, *supra*, is not jurisdictional. Failure to comply with one or both of these requirements, if objected to by the defendant, would be error. The defendant may waive the right, and, failing to save any exception to such omission, will be presumed to have done so. (*Territory v. Ussery*, 177.)
35. SAME—SAME—PLEA AND READING PLEA DISTINGUISHED—TERRITORY V. BRASH, 3 ARIZ. 141, 32 PAC. 260, CITED.—The failure to plead to the indictment is jurisdictional, *Territory v. Brash*, *supra*, cited; but the failure of the clerk to read the indictment and state the plea is not, and does not affect a substantial right of the defendant. (*Territory v. Ussery*, 177.)
36. CRIMINAL LAW—UNLAWFUL BRANDING—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 969—INDICTMENT—INSUFFICIENCY—FAILURE TO

CRIMINAL LAW (Continued).

ALLEGE INTENT TO CONVERT.—An indictment for branding the calf of another, under the statute, *supra*, is demurrable, it failing to state one of the essential elements of the offense to punish which the said statute was enacted,—to wit, the intention of defendant to convert the animal branded to his own use. (*Blevins v. Territory*, 326.)

See Constitutional Law, 1.

CROPPER'S CONTRACT.

1. **CROPPER'S CONTRACT.**—A contract between plaintiff and Thomas, whereby plaintiff agreed to furnish land, water, and seed, and Thomas agreed to sow, irrigate, cultivate, harvest, thresh, and sack all grain grown at his own expense, and that title should remain in the plaintiff until certain portions of the grain were delivered to the plaintiff, and that then, and not before, the remainder should be paid to Thomas, and that at all times the land should be deemed in the possession of plaintiff, and if Thomas failed to perform his part of the contract in a diligent and workmanlike manner, plaintiff might perform the same himself, and all rights of Thomas thereupon should cease, does not create the relation of landlord and tenant, but is a "cropper's" contract. (*Gray v. Robinson*, 24.)
2. **SAME—LEASE—DETERMINATION DEPENDENT UPON WHETHER OR NOT INTEREST IN LAND IS CREATED—ROMERO V. DALTON**, 2 ARIZ. 210, 11 PAC. 863, CITED.—The character of a contract to cultivate land on shares is to be determined by ascertaining the intention of the parties as expressed in the language used. If it imports a present demise of any character by which any interest in the land passes to the occupant the contract becomes one of lease; if, on the other hand, there be no such language, but by the express terms of the contract the general possession of the land is reserved by the owner, the occupant becomes a mere cropper, and the relation of master and servant exists between him and the owner. *Romero v. Dalton*, *supra*, cited. (*Gray v. Robinson*, 24.)
3. **SAME—EXECUTION—LEVY—INTEREST OF CROPPER.**—A cropper being a mere servant of the owner, has no such interest in the grain as to render it liable to execution for his debt so long as it remains *en masse*. (*Gray v. Robinson*, 24.)

CROSS-BILL. See Action, 1.

CROSS-LODES. See Mines and Mining, 3, 6.

DAMAGES. See Officer and Officers, 8; Pleading, 1; Stock and Stockholders, 1; Torts, 1, 2; Verdict, 1; Water and Water Rights, 4, 5.

DEATH BY WRONGFUL ACT. See Negligence, 1; Torts, 1. 2.

DECLARATIONS.

Of co-conspirator, when admissible. See Criminal Law, 12.

DEDICATION.

1. **DEDICATION—PARKS—EVIDENCE.**—Land appearing upon a map of Neahr's Addition to the city of Phoenix as a park, with no other designation except the figures "570" on its sides and "300" on its ends, and among the references on the margin these words: "Public Grounds, 570-300," platted by a surveyor under the instructions of an agent of the owner, is sufficient dedication to the public, where the owner ratified such acts by making sales of lots in said addition, reference being had to this map for a more complete description of the property sold. (Evans v. Blankenship, 307.)
2. **SAME—SAME—PURPOSE OF—EVIDENCE—SUBSEQUENT DECLARATIONS.**—Evidence of letters written to the speaker of the territorial assembly by the owner subsequent to the dedication to the public to the effect that he offered it for a site for the territorial capitol cannot control, as at that time, the dedication being complete, he had no further control over it. (Evans v. Blankenship, 307.)
3. **SAME—SAME—ACCEPTANCE—NECESSITY FOR.**—The action of the city council, in 1888, ordering that the plaza in Neahr's Addition be cleaned up was a sufficient and timely acceptance by the city, if, in fact, any acceptance by it was necessary. (Evans v. Blankenship, 307.)
4. **SAME—SAME—TAXATION—ESTOPPEL.**—The assessment for municipal taxes of a park dedicated to the public does not estop the city from thereafter claiming it for park purposes. (Evans v. Blankenship, 307.)

DEDUCTION FOR LABOR.

None allowed in action of claim and delivery where legal identity of property is not destroyed. See Claim and Delivery, 4.

DE FACTO MEMBERS.

Board of supervisors. See Office and Officers, 2.

DE FACTO OFFICER.

Right to salary, there being no *de jure* officer. See Officers, 2.

DEFAULT.

1. **DEFAULT—MOTION TO STRIKE AN ANSWER FILED AFTER ENTRY OF—EXCUSE FOR DELAY.**—An answer filed after entry of default is properly stricken out on motion in the absence of any excuse for failure to file the answer within the time allowed by law. (Agua etc. Co. v. Bashford-Burmister Co., 203.)

DEFAULT (Continued).

2. **SAME—MOTION TO OPEN AND FOR LEAVE TO FILE ANSWER—MUST SHOW EXCUSE FOR DELAY.**—A motion to open a default and permit answer to be filed is properly denied where there is no excuse or reason offered why the defendant neglected to answer in the first instance. (Agua etc. Co. v. Bashford-Burmister Co., 203.)

See Clerk of Court, 1; Judgment, 1.

DEFENSE.

Account not presented before suit filed, is not a defense to an action upon an account stated. (Agua etc. Co. v. Bashford-Burmister Co., 203.)

See Account Stated, 1; Criminal Law, 30; Life Insurance, 3, 4.

DELINQUENT LIST. See Taxes and Taxation, 1.

DELIVERY.

Want of immediate, only *prima facie* evidence of fraud. See Fraud, 1.

DEMAND

Allowance. Acceptance of part of claim, precludes further action for balance. See Office and Officers, 7.

DESERT-LAND ACT. See Public Lands, 1.

DIP. See Mines and Mining, 3.

DISMISSAL

Of complaint, does not prevent defendant from proceeding to trial upon a cross-bill. (Hawke v. Wentworth, 317.)

See Action, 1; Appeal and Error, 13.

DIVERSION.

Right to have water delivered in river at head of ditch. See Water and Water Rights, 3.

DUE CARE.

Presumed, where contributory negligence is relied on as a defense. See Negligence, 2.

DUPLICATE RECEIPT.

Of receiver. See Public Lands, 2.

EJECTMENT. See Mexican Grants, 5; Public Lands, 2.

ELECTIONS.

1. ELECTIONS—PROCLAMATION—NECESSITY FOR—PURPOSE OF—NOTICE—POWER OF GOVERNOR TO DETERMINE OFFICERS TO BE ELECTED—“OFFICES TO BE FILLED” APPLIES PARTICULARLY TO SPECIAL ELECTIONS—CLERK—DUTY TO PLACE NAMES ON BALLOT—REV. STATS. ARIZ. 1887, PARS. 1588, 1589, 1590, 1591, CITED AND CONSTRUED.—Paragraph 1588, *supra*, provides that “there shall be held throughout the territory upon the Tuesday after the first Monday in November, A. D. 1888, and every two years thereafter, an election for members of the legislative assembly and such other officers as may be required by law to be chosen at such election, to be called the ‘general election.’” Paragraph 1589, *supra*, provides: “Special elections shall only be held to fill the vacancies in the office of members of the legislature or delegate to Congress, on the proclamation of the governor for that purpose.” Paragraph 1590, *supra*, provides: “At least thirty days before a general election and at least ten days before any special election the governor must issue an election proclamation. . . .” Paragraph 1591, *supra*, provides: “Such proclamation must contain: (1) a statement of the time of the election and the offices to be filled. . . .” Under these statutes a proclamation of election is necessary for the holding of any election, and is for the purpose of giving notice of the time and place of holding the election. It is not in the power of the governor to authorize the election of an officer not provided for by law at a general election. The statute requiring “the offices to be filled” to be in the proclamation applies more particularly to the proclamations for special elections. The fact that the proclamation provided for the election of three members of the board of supervisors does not *of itself* make it the duty of the clerk of the board of supervisors to place upon the ballot the name of the third nominee, the election being a general election and the officers to be elected being determined by law. (Sheen v. Hughes, 337.)

EMINENT DOMAIN.

1. EMINENT DOMAIN—RIGHT OF DEFENDANT TO COMPENSATION PAID IN UNDER REV. STATS. ARIZ. 1887, PAR. 1778, PENDING APPEAL.—The statute, *supra*, provides in substance that a plaintiff who succeeds in condemning property may, pending an appeal, obtain possession of the same upon paying into court for the defendant the amount of compensation, as determined by the jury, which the defendant is entitled to have paid over to him upon filing the proper receipt and an abandonment of defenses to the action other than as to the amount of compensation. When the latter have been done, and the plaintiff has been let into possession, it is made mandatory upon the court to order the payment of the money, and the court below exceeded its authority in directing the money paid in by plaintiff be retained by the clerk pending the appeal, and in denying the order prayed by defendant, he having complied with the statute. (Fisher v. District Court, 254.)

ESTOPPEL.

1. **ESTOPPEL—EXEMPTION—PARTNERSHIP—EVIDENCE.**—Evidence that the business of plaintiff, a married woman, and the head of a family, was conducted under the name of Mrs. M. J. Smith & Co.; that a son about twenty-one years of age worked in her store; that in conversation with creditors in purchasing goods, they used the plural pronoun "we"; also directed the goods shipped "to M. J. Smith & Co."; also that the son stated to one of them: "We wish you to ship the goods immediately. We want them as soon as possible"; also that one of the creditors asked plaintiff the question, "Who are your partners?" and she answered, "My creditors are my partners"; and the question, "Why do you do business in that name?" to which she answered, in effect, "That is my business," is insufficient to estop plaintiff from proving the business was not that of a partnership and claiming her rights of exemption. (Smith v. Brown, 358.)

BAKER, C. J., dissenting.

2. **SAME—PARTNERSHIP—BELIEF INDUCED BY REPRESENTATIONS.**—Unless the creditors thought they were dealing with a partnership, and were induced to so believe by the conduct of plaintiff, and that plaintiff's said action was for the purpose of inducing them to believe that as a fact, plaintiff is not estopped to claim the business as her sole property. (Smith v. Brown, 358.)
3. **SAME—REGARDED WITH DISFAVOR.**—The law does not favor estoppels, because they operate to shut out the truth and prevent parties from asserting or defending their rights by proof of actual existing facts. (Smith v. Brown, 358.)

See Dedication, 4.

EVIDENCE.

1. **EVIDENCE—IRRELEVANT AND IMMATERIAL—PREJUDICIAL.**—The admission of evidence irrelevant and immaterial to the issues, and sufficient to prejudice the jury against the appellants, requires a reversal of the judgment. (Jordan v. Duke, 278.)
2. **EVIDENCE—OPINIONS—PRUDENCE OF INJURED PERSON—QUESTION FOR JURY.**—A question as to whether a person, ordinarily prudent, could fail to have perceived the trench into which plaintiff fell is clearly objectionable, it calling for the opinion of the witness as to the prudence of the plaintiff, which is a question for the jury. (Huachuca Water Co. v. Swain, 113.)
3. **SAME—SAME—QUANTITY OF LIGHT—COMPETENCY.**—Opinions of witnesses as to the quantity of light are competent, but the inquiry must be limited to the degree of light or darkness. (Huachuca Water Co. v. Swain, 113.)

Error in introduction and exclusion of, must be embodied in motion for new trial. See Appeal and Error, 21; Criminal Law, 7.

EVIDENCE (Continued).

See Appeal, 1; Appeal and Error, 15; Attorney and Client, 1; Contract, 2; Criminal Law, 8, 9, 12, 13, 14, 15, 29, 30, 31, 32; Dedication, 1, 2; Estoppel, 1; Negligence, 1, 2; Pleading, 1, 6; School Lands, 1; Trusts, 1, 2.

EXECUTIONS.

1. **EXECUTIONS—LEVY—SHERIFFS—EXPENDITURES FOR BETTERMENT—DUTY TO SELL IN FORM AS SEIZED.**—Where grain in stack is levied upon, it is the business of the sheriff, under the writ, to sell the property in stack, and he is not justified in threshing or expending labor upon it not necessary for its preservation. (*Gray v. Robinson*, 24.)

See Cropper's Contracts, 3.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS—FOREIGN EXECUTORS—CAPACITY TO SUE.**—An executor or administrator appointed in a foreign state may lawfully sue in this territory upon a judgment obtained by him in the place of his appointment, in his representative capacity, without taking out letters testamentary or letters of administration in this territory. (*Arizona Cattle Co. v. Huber*, 69.)

EXEMPTION. See Estoppel, 1.

EXTRALATERAL RIGHTS. See Mines and Mining, 4, 5, 9.

FEES. See Office and Officers, 3, 4, 5, 6, 7; Statutes, 4.

FELLOW-SERVANTS.

1. **FELLOW-SERVANTS—SECTION-MAN—CONDUCTOR—HOBSON V. RAILROAD CO., 2 ARIZ. 171, CITED.**—A section foreman is not a fellow-servant of the conductor of a railway train upon which he is being carried from the point where he has been at work. *Hobson v. Railroad Co., supra*, cited. (*McGill v. Southern Pacific Co.*, 116.)

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY AND DETAINER—NATURE—ISSUE—POSSESSION—REV. STATS. ARIZ. 1887, PAR. 2016, CITED.**—In forcible entry and detainer, the right to present and immediate actual possession is the only question for adjudication. Statute, *supra*, cited. (*Bishop v. Perrin*, 190.)

FORECLOSURE. See Appeal and Error, 9; Mortgages, 1.

FOREIGN EXECUTORS.

Capacity to sue. See Executors and Administrators, 1.

FORFEITURES. See Contract, 3.

FRAUD.

1. FRAUD—TRANSFERS—PERSONAL PROPERTY—WANT OF IMMEDIATE DELIVERY ONLY PRIMA FACIE EVIDENCE OF FRAUD—REV. STATS. ARIZ. 1887, TIT. 30, SEC. 5, CITED—FRAUD QUESTION OF FACT—REV. STATS. ARIZ. 1887, TIT. 30, SEC. 8, CITED.—Where a wife purchased cattle belonging to her husband which were in possession of a third party, who was notified of the purchase, but continued in possession till the following spring, when the cattle were delivered to her, and at the time of purchase a bill of sale was executed and duly recorded, such sale is not, as a matter of law, fraudulent as against creditors, because there is no actual change of possession and immediate delivery, section 5, *supra*, providing that, unless there is immediate delivery, etc., it is "*prima facie* evidence of fraud," and section 8, *supra*, providing that the question of fraudulent intent shall be deemed a question of fact, and not of law. (Liebes v. Steffy, 11.)

FUNDAMENTAL ERRORS.

Must be reviewed although bill of exceptions cannot be considered. See Appeal and Error, 13.

What constitutes. See Appeal and Error, 7, 8, 9.

Will be considered in absence of bill of exceptions. See Appeal and Error, 11.

GENERAL LAWS. See Special Legislation, 3.

GOVERNOR.

Power of, to determine officers to be elected. See Elections, 1.
See Officers, 1.

GRAND JURY.

How summoned. See Criminal Law, 16.

HABEAS CORPUS.

1. HABEAS CORPUS—NOT PROPER FOR REVIEW OF ERRORS NOT GOING TO JURISDICTION.—We cannot review the record upon an application for a writ of *habeas corpus* to correct mere errors that do not go to the jurisdiction of the court over the offense or the person. (In re Smith, 95.)

HARMLESS ERROR. See Appeal and Error, 26; Criminal Law, 17.

HAZARDOUS EMPLOYMENT. See Master and Servant, 1, 2.

HOMESTEAD ENTRY. See Mexican Grants, 4.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—SEPARATE ESTATE—PURCHASE BY WIFE—“ACQUIRED” AS USED IN REV. STATS. ARIZ. 1887, TIT. 34, CH. 3, SEC. 17, CONSTRUED.**—The word “acquired,” in section 17, *supra*, providing that “all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife while,” etc., “shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband alone,” was not intended to include a purchase made by the wife with her separate money or property. (*Liebes v. Steffy*, 11.)
2. **SAME—SAME—PERSONAL PROPERTY—REAL PROPERTY—ACQUIRED BY WIFE BY PURCHASE OR EXCHANGE MAY BE HELD AS SEPARATE PROPERTY.**—A married woman may, under the laws of this territory, by purchase or exchange, acquire personal property or real property and hold the same as her separate property. (*Liebes v. Steffy*, 11.)
3. **SAME—SAME—PERSONAL PROPERTY PURCHASED BY WIFE WITH HER SEPARATE PROPERTY—NOT SUBJECT TO EXECUTION AGAINST HUSBAND.**—Cattle, separate property of husband, purchased by wife from him, at the full price, with money which was her separate property, become her separate property, and are not subject to execution on a judgment against the husband, the good faith of the transaction not being questioned. (*Liebes v. Steffy*, 11.)

INDICTMENT. See Criminal Law, 21, 22, 23, 34, 35, 36.

INJUNCTION.

1. **INJUNCTION—RESTRAINING LEVY OF EXECUTION BASED ON VOID JUDGMENT.**—Injunction will lie to restrain the levy of an execution upon a judgment rendered by a justice of the peace to whom a cause has been transferred prior to receipt by him of a transcript, required by paragraph 1409, *supra*, of proceedings in the court from which the case came. (*Dial v. Olsen*, 293.)

See Water and Water Rights, 5.

INSTRUCTIONS. See Criminal Law, 1, 2, 3, 24, 25, 26, 27; Jury, 1, 2, 3; Personal Injuries, 1; Torts, 2.

INTENT.

Must be alleged when essential element of offense. See Criminal Law, 36.

INTEREST.

Default in payment—Effect. See Appeal and Error, 9.
See Mortgages, 1.

INTERPRETATION. See Taxes and Taxation, 4.

ISSUES.

Not to be raised by evidence; recovery must be upon issues raised by pleadings. See Pleading, 3.

JOURNALS.

Of legislature, not evidence of acts. See Statutes, 1, 2, 3.

JUDGMENT.

1. **JUDGMENT—DEFAULT—SUIT TO SET ASIDE—SERVICE ON AGENT—COLLUSION.**—In a suit in equity to have a former default judgment declared void, and for other equitable relief, it is error for the trial court to refuse to allow plaintiff to defend the original suit at law where it appears that appellant herein (defendant in the original suit) was a foreign corporation; that it had filed its appointment of its lawful agent of record in the county in which it did business; that such agent was its general manager when appointed, but was discharged six months prior to the filing of the first suit, though his appointment was not revoked of record until after that suit was filed; that he thereupon removed to another county and a new general manager was employed; that appellee was the son-in-law of the former manager, and, having full knowledge of the facts, commenced suit, served summons on his father-in-law, and took judgment by default the day after time to answer had expired, and before appellant had actual knowledge it was sued; that appellant filed its motion to set aside the default judgment as soon as it knew the same was entered, but the term of court adjourned before this motion was disposed of, and the appellant was deprived of the right to settle a bill of exceptions and appeal from the action of the court; that at another term it endeavored to get the judgment set aside, but failed. (San Pedro Cattle Co. v. Williams, 166.)

Final—What reviewable. See Appeal and Error, 22.

Recitals in, part of record. See Appeal and Error, 25.

See Appeal and Error, 9, 20; Judgment Lien, 1.

JUDGMENT LIEN.

1. **JUDGMENT LIEN—VOID JUDGMENT—POWER TO PERPETUATE LIEN.**—A court has no power to perpetuate a judgment lien and at the same time declare the judgment upon which such lien depends for its validity null and void. (Owen v. Howard, 195.)

JUDICIAL NOTICE.

Executive acts. See Mexican Grants, 4.

JURISDICTION. See Appeal and Error, 2, 11, 13, 24; Justice of the Peace, 1; Mexican Grants, 1, 2, 3; Writ of Prohibition, 1.

JURORS. See Criminal Law, 17, 18, 19, 20.

JURY.

1. JURY—INSTRUCTION—AMBIGUITY—IN SPECIAL INSTRUCTION—CORRECTNESS TESTED BY ALL INSTRUCTIONS.—The instructions in a case must all be considered together; and if, when considered together, they present the law of the case, the verdict will not be disturbed, even though the phraseology of an individual instruction may be confusing. (Territory v. West, 212.)
2. SAME—SAME—NECESSITY FOR REQUEST.—In the absence of a request for an instruction defining a deadly weapon, the court is not compelled to give such instruction. (Territory v. West, 212.)
3. JURY—INSTRUCTIONS—SUBMITTING QUESTION OF LAW TO JURY—MINES AND MINING.—An instruction containing the expression that if the mining ground was "not in the actual possession of one entitled thereto" at the time appellants located the same, then they were entitled to recover, submits a question of law to the jury, and is error. (Jordan v. Duke, 278.)
4. JURY—TRIAL BY DEFINED.—By the term "trial by jury" is meant trial by jury in the general manner as practiced at common law. At common law a lawful jury was composed of twelve jurors, and the unanimity of these twelve members in finding a verdict was an essential attribute. (Carroll v. Byers, 158.)

See Appeal and Error, 4; Constitutional Law, 2; Criminal Law, 10, 16.

JUSTICE COURT.

When appeal lies from. See Appeal and Error, 1.

JUSTICE OF PEACE.

1. JUSTICE OF PEACE—CHANGE OF VENUE—JURISDICTION—NECESSITY FOR FILING OF TRANSCRIPT—REV. STATS. ARIZ. 1887, PAR. 1408, 1409, CONSTRUED.—Where a change of venue is granted in a justice's court, and an order of transfer made, as is required by paragraph 1408, *supra*, the jurisdiction of the justice granting the order ceases, and the jurisdiction of the justice to whom the case is sent attaches by operation of law; but the latter cannot proceed to exercise the jurisdiction until the officially certified transcript of the docket entries in the case provided for by paragraph 1409, *supra*, is filed. A judgment rendered by the latter before the receipt of the transcript is a nullity. (Dial v. Olsen, 293.)
2. SAME—MANDAMUS—TO COMPEL TRANSMISSION OF TRANSCRIPT REQUIRED BY REV. STATS. ARIZ. 1887, PAR. 1409.—*Mandamus* will lie to compel a justice to make out and transmit the transcript required by paragraph 1409, *supra*. (Dial v. Olsen, 293.)
3. SAME—SPECIAL APPEARANCE—DOES NOT WAIVE ERROR IN PROCEEDING WITHOUT TRANSCRIPT—ANSWER TO MERITS AFTER OBJECTION

JUSTICE OF PEACE (Continued).

OVERRULED.—A defendant does not waive the illegality in a justice, to whom a case is transferred, proceeding to trial and judgment in the absence of a transcript of the proceedings in the former court, by appearing specially and objecting thereto, nor by answering and defending after his objection was overruled. (*Dial v. Olsen*, 293.)

4. **JUSTICE OF THE PEACE—TERM OF OFFICE—REV. STATS. ARIZ. 1887, PAR. 484, 1393, CITED AND CONSTRUED—PRECINCT OFFICER—ELECTION—TIE VOTE—HOLDING OVER—PARAGRAPHS 484 AND 1393 NOT REPEALED BY LAWS ARIZ. 1891, ACT NO. 47, WHICH AMENDS REV. STATS. ARIZ. 1887, PAR. 467.**—The term of a justice of the peace is two years, and until his successor is elected and qualified. Par. 1393, *supra*. All county and precinct officers shall hold office until their successors are elected and qualified. Par. 484, *supra*. A justice of the peace is a precinct officer; and where the incumbent of the office is a candidate for re-election, it is necessary that another candidate should receive more votes than he to fill the office by election. Where there is a tie vote, the election of a successor to the office is prevented, and the incumbent will hold over under his former commission. Paragraphs 484 and 1393, *supra*, were not repealed by act No. 47, *supra*. That act only amended paragraph 467, *supra*. (*Meyer v. Culver*, 145.)
5. **SAME—BOARD OF SUPERVISORS—POWER TO APPOINT—VACANCY.**—Where there is no vacancy in the office of the justice of the peace, an appointment to such office by the board of supervisors is void. (*Meyer v. Culver*, 145.)

LARCENY. See Constitutional Law, 1.

LEASE. See Cropper's Contract, 2.

LEGISLATURES.

1. **LEGISLATURES—SESSIONS—SIXTY DAYS—REV. STATS. U. S., SEC. 1852, CONSTRUED—POWER TO APPROVE AND PASS BILLS THEREAFTER—CHEYNEY V. SMITH, 3 ARIZ. 143, 23 PAC. 680, EXPRESSLY OVERRULED.**—Territorial legislatures are limited to sixty days' duration. Sec. 1852, *supra*, construed. Neither the governor nor legislature has any power to approve or pass bills thereafter. *Cheyney v. Smith*, *supra*, expressly overruled. (*County of Maricopa v. Osborn*, 331.)

LEVY. See Cropper's Contract, 3; Executions, 1; Taxes and Taxation, 3.

LICENSE.

1. **LICENSE—MERCHANTS—REV. STATS. ARIZ. 1887, PAR. 2239, SEC. 9, AS AMENDED BY ACT NO. 83, LAWS OF 1893, VOID IN PART, AS IN CON-**

LICENSE (Continued).

FLICT WITH THE CONSTITUTION OF THE UNITED STATES.—Act No. 83 of the laws of 1893, amending paragraph 2239, section 9, of the Revised Statutes of 1887, *supra*, providing for the collection of a license tax from “every person, firm, or corporation, who may deal in goods, wares, and merchandise, except in agricultural or horticultural products of this territory, when vended by the producer thereof, and except when sold by auctioneers or commission merchants, under the license or permission, according to law,” is not in conflict with clause 1 of section 2 of article IV of the constitution of the United States, providing: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,” nor with clause 3 of section 8 of article I of the constitution, providing: “The congress shall have power . . . (3) To regulate commerce with the foreign nations, and among the several states, and with the Indian tribes,” except that portion which permits agricultural and horticultural products of this territory to be vended by the producer without a license, and an auctioneer or commission merchant to vend such products without being required to obtain a license in addition to his license as an auctioneer or commission merchant. (In re Sydow, 207.)

2. **SAME—ACT VOID IN PART.**—A license act may be void in part without rendering the whole act invalid. (In re Sydow, 207.)
3. **SAME—RIGHT TO COMPLAIN OF TAX—RECORD MUST SHOW EXEMPTION.**—Where the record fails to show that the applicant was dealing exclusively in the product of the privileged class, he cannot complain of imprisonment for failure to obey the License Act. (In re Sydow, 207.)

LIEN. See Mines and Mining, 1, 2.

LIFE INSURANCE.

1. **LIFE INSURANCE—PHYSICIAN DEFINED.**—To be one’s physician means to attend upon him or to consult with him in a professional capacity about one’s state of health. (Mutual Life Ins. Co. v. Arhelger, 271.)
2. **SAME—POLICY—ANSWER—WARRANTIES—FALSITY AVOIDS POLICY.**—Statements made by deceased in answer to questions contained in his application for a policy of life insurance wherein he represented that he had not consulted any physician for sickness since childhood, and did not remember the name or address of any physician attending him, by him “warranted to be true,” and “offered to the company as a consideration of the contract,” under the stipulation of the parties and the evidence in the case, shown to be false, constitute a breach of deceased’s warranty and avoid the policy. (Mutual Life Ins. Co. v. Arhelger, 271.)
3. **SAME—SAME—DEFENSE—BREACH OF WARRANTY OF TRUTH OF AN-**

LIFE INSURANCE (Continued).

ANSWERS—KNOWLEDGE OF APPLICANT OF FALSITY IMMATERIAL.—It is a good defense to an action on a policy of life insurance to show that answers made a part of the policy and warranted by the applicant to be true were in fact untrue, without showing that the applicant knew or believed them to be untrue. (*Mutual Life Ins. Co. v. Arhelger*, 271.)

4. **SAME—SAME—SAME—PROOF OF KNOWLEDGE OF FALSITY NECESSARY WHEN ANSWERS ARE REPRESENTATIONS—MOULOR V. INSURANCE CO.**, 111 U. S. 335, 4 SUP. CT. REP. 466, DISTINGUISHED.—When the words used in a contract of insurance are plain and constitute a strict warranty of the truth of the answers to questions therein contained, the rule in *Moulor v. Insurance Co.*, *supra*, that there was doubt of the meaning of the contract, and that it was therefore proper to consider the statements of the applicant as “representations” and warranties only to the extent that they were made in good faith and were true as far as the insured knew, is inapplicable. (*Mutual Life Ins. Co. v. Arhelger*, 271.)

LOCATIONS. See Mines and Mining, 4, 7.

MACHINERY.

Duty to furnish reasonably safe; duty to guard. See Master and Servant, 3, 4, 5; Negligence, 3.

MALICE AFORETHOUGHT. See Criminal Law, 25.

MANDAMUS. See Justice of Peace, 2; Office and Officers, 1, 2.

MASTER AND SERVANT.

1. **MASTER AND SERVANT—HAZARDOUS EMPLOYMENT—SERVANT KNOWN TO BE INEXPERIENCED—MASTER'S DUTY TO INSTRUCT—NEGLIGENCE.**—When the employment is hazardous and dangerous, requiring some skill and experience to properly guard against accident and consequent injuries, it is the duty of the master, if the servant be known to be, through youth, inexperience, or want of capacity, ignorant of the dangers, and the proper manner of doing his work so as to avoid them, to see to it that this servant be informed of the risks he assumes, and properly instructed, so that he may be able to do his work in such a way that he may be as safe against accident as proper care on his part may insure. If the master fail in this duty, it is, in law, negligence. (*Arizona Lumber Co. v. Mooney*, 96.)
2. **SAME—SAME—INEXPERIENCED SERVANT—ASSUMED RISK—PRESUMPTION.**—An employee who is shown to be inexperienced in the use of machinery of the kind he is set to work with will not be presumed, in absence of proof to the contrary, to comprehend and to contract to assume such dangers as are incident thereto as may

MASTER AND SERVANT (Continued).

not, to a person of his age and general capacity, be apparent and obvious. (Arizona Lumber etc. Co. v. Mooney, 96.)

3. **MASTER AND SERVANT—PERSONAL INJURIES—MACHINERY—DUTY TO GUARD.**—Plaintiff cannot recover in an action for damages for personal injuries resulting from operating a saw, because of lack of a guard, where it appears that the saw in use was not designed to have such guard, was one of the best patterns, complete in all respects, in good order, and of a kind used by many other sawmills. (Arizona Lumber etc. Co. v. Mooney, 366.)
4. **SAME—MACHINERY—DUTY TO FURNISH REASONABLY SAFE.**—The master is not bound to provide the servant with machines which are absolutely the most convenient or most safe. His duty is sufficiently discharged by providing those which are reasonably safe and fit. (Arizona Lumber etc. Co. v. Mooney, 366.)
5. **SAME—COMMON LABORER—MACHINERY — INSTRUCTION — SKILLFULNESS—INJURY FROM OTHER CAUSE—RELEVANCY.**—Allegations that plaintiff was a common laborer, and, without knowledge of the use of the machine, he was put to work without instructions as to how to operate it, are insufficient to warrant a recovery where the injury was the result of some cause other than unskillfulness. (Arizona Lumber etc. Co. v. Mooney, 366.)
6. **SAME—LIABILITY FOR INJURY—INJURY MUST RESULT FROM MASTER'S OMISSION OR NEGLECT OF DUTY.**—The mere existence of a defect, the mere occurrence of an accident, the mere omission of a duty, are not sufficient to create a liability for personal injuries. It is necessary to proceed further, and to show that the defect or omission of duty caused the accident. (Arizona Lumber etc. Co. v. Mooney, 366.)

MECHANIC'S LIEN. See Mines and Mining, 1, 2.

MERCANTILE PURPOSES.

Included in words "industrial pursuits." See Corporation, 5.

MERCHANTS. See License, 1.

MESQUITE.

Not timber. See Public Lands, 4.

MEXICAN GRANTS.

1. **MEXICAN GRANTS—COURTS—JURISDICTION TO DETERMINE PRIVATE CLAIM TO LAND UNDER.**—A private claim to land in Arizona under an unconfirmed Mexican land grant cannot be contested in the local courts of justice where no proceedings are pending before Congress, the surveyor-general of the United States, or the private land court of March 3, 1891. (Ainsa v. New Mexico etc. R. R. Co., 236.)

MEXICAN GRANTS (Continued).

2. **SAME—TITLE—POWER TO SETTLE RESERVED BY CONGRESS—MUST BE CONFIRMED BEFORE LOCAL COURTS HAVE JURISDICTION.**—Congress has reserved to itself in Arizona the power of settling titles to Mexican land grants, and has delegated its power to the private land court. Congress must in some way confirm this class of grants before this court may have jurisdiction thereof. (*Ainsa v. New Mexico etc. R. R. Co.*, 236.)
3. **SAME—COURTS—JURISDICTION—NONE CONFERRED ON LOCAL COURTS BY 26 U. S. STATS. AT L. 854.**—The act of March 3, 1891, *supra*, does not authorize this court to settle the title to Mexican land grants. (*Ainsa v. New Mexico etc. R. R. Co.*, 236.)
4. **SAME—JUDICIAL NOTICE—EXECUTIVE ACTS—HOMESTEADS AND PRE-EMPTIONS.**—This court must recognize and take judicial notice of the acts of the executive department of the government in allowing the entry of homesteads and pre-emptions in preference to the unconfirmed title of a Mexican land grant. (*Ainsa v. New Mexico etc. R. R. Co.*, 236.)
5. **MEXICAN GRANTS — EJECTMENT — UNCONFIRMED GRANT WILL NOT SUPPORT—ASTIAZARAN V. SANTA RITA ETC. MINING CO., 148 U. S. 80, 13 SUP. CT. REP. 457, FOLLOWED.**—Title resting upon a Mexican grant, favorably reported upon by the surveyor-general, but not as yet acted upon by Congress, will not support an action of ejectment. *Astiazaran v. Santa Rita etc. Mining Co.*, *supra*, followed. (*Santa Rita etc. Co. v. Mercer*, 104.)

MILEAGE.

For executing criminal process. See Office and Officers, 6.

MINES AND MINING.

1. **MINES AND MINING—CONTRACT TO PURCHASE—MECHANICS' LIEN—PURCHASER AGENT FOR VENDOR—REV. STATS. ARIZ. 1887, PARS. 2278, 2280, CONSTRUED—FAILURE TO RECORD CONTRACT—FACTS CREATING EXCEPTION TO RULE THAT PURCHASER CANNOT CREATE LIEN.**—Mott went into possession of mill and mining claims of appellant under a written contract, which, though in the form of a lease, was intended to enable the appellant to sell, and the said Mott to buy, the premises, by extracting and reducing the ore, and crediting the proceeds upon the purchase price. By its terms Mott was to mine and reduce the ore, and appellant was to receive the entire net proceeds, the cost of extracting and milling being deducted, for a period of six months; all payments to be forfeited and the property and improvements to revert to appellant if Mott failed to complete the purchase. Mott operated the mill for several months, and finally delivered back the mill with all improvements to appellant. Under paragraph 2278, *supra*, persons furnishing material for use upon mills, at the request of the owner or his agent, are given a lien

MINES AND MINING (Continued).

thereon for the amount due. Paragraph 2280, *supra*, defines "agent" as including persons who have the charge or control of any mill, etc., upon which labor has been performed or material furnished. The improvements made upon the property were directly contemplated by the contract; the appellant was the beneficiary, whether Mott became the purchaser or not; Mott had "charge and control" of the mill and mines; the instrument never was recorded, and the appellees had no notice of its terms. Under such circumstances the principle that when one of two innocent parties must suffer a loss by reason of the fault of a third, the loss should be borne by him who gave the third person power to commit the fault is applicable. The facts of the case take it out of the general rule that one having a mere contract to purchase, or a lessee, cannot encumber the property with liens, and Mott was properly held to be the agent of appellant in procuring the supplies, and the property was liable for the value thereof in the way of lien. (*Eaman v. Bashford & Burmister*, 200.)

2. SAME—SAME—SAME—TERMS OF CONTRACT BINDING BETWEEN PARTIES CANNOT AFFECT LIEN.—A clause in such contract providing that the work should be done at the cost of Mott, while binding as between the parties, will not be suffered to defeat the lien. (*Eaman v. Bashford & Burmister*, 200.)
3. MINES AND MINING—CROSS-LODES—DIP—STRIKE—REV. STATS. U. S. 1878, SEC. 2336, CONSTRUED.—Section 2336, *supra*, defines the rights of locators in the space of intersection of lodes crossing or uniting on the dip, and has no reference to crossing of lodes on the strike. (*Watervale Min. Co. v. Leach*, 34.)
4. MINES AND MINING — LOCATION — EXTRALATERAL RIGHTS — REV. STATS. U. S. 1878, SECS. 2319, 2322, CITED.—Sections 2319 and 2322, *supra*, give all lodes, veins, and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface lines of the claim extended downward vertically; and as lodes may dip and extend beyond the boundaries of the claim, they may be followed, but the locator shall be entitled only to such part thereof as lies between vertical planes drawn downward through the end-lines of the claim. (*Watervale Min. Co. v. Leach*, 34.)
5. SAME—EXTRALATERAL RIGHTS.—A locator may in two instances pursue a lode beyond the limits of his claim: First, when the lode, having the apex within the boundaries of his claim, shall dip beyond them; and second, when he shall have located a lode prior to the tenth day of May, 1872, under the mining laws then in force, and shall, as against a subsequent and overlapping claim, have saved his right to his lode in the manner prescribed in the act of 1872. In the latter case the prior locator may follow his lode, upon its strike or dip, into other ground than his own. (*Watervale Min. Co. v. Leach*, 34.)

MINES AND MINING (Continued).

6. **SAME—CROSS-LODES—REV. STATS. U. S. 1878, SEC. 2336, CITED.**—Section 2336, *supra*, provides that, at the space of intersection of lodes crossing, the oldest locator shall have the ore, and the junior locator shall have a right of way through the space to pursue and work his lode; that if there be a union of two lodes, the senior locator shall take the ore at the space of intersection or union, and all of the lode below the point of union. (Watervale Min. Co. v. Leach, 34.)
7. **SAME—LOCATION—CROSS-LOCATION—LENGTH OF CLAIM—SIDE-LINES TREATED AS END-LINES.**—It is not essential to the validity of a mining claim that it be located along the course of the lode. The statute provides that the extreme extent along the lode shall not exceed fifteen hundred feet. It may be less. If the side-lines, instead of the end-lines, cross the course of the lode, in order to define the locator's rights to pursue the lode on its dip, the side-lines will be treated as the end-lines. (Watervale Min. Co. v. Leach, 34.)
8. **SAME—REV. STATS. U. S. 1878, SEC. 2336, CONSTRUED.**—The expression, the "ore within the space of intersection," used in section 2336, *supra*, means that body of ore bounded by the foot- and hanging-walls of one lode, extended in a general course of that lode, and the foot- and hanging-walls of the intersecting lode, extended upon its general course. It is only to this body of ore that section 2336 relates. (Watervale Min. Co. v. Leach, 34.)
9. **SAME—EXTRALATERAL RIGHTS—NO RIGHT TO GO OUTSIDE ON STRIKE OR COURSE, EXCEPT ON LOCATIONS PRIOR TO 1872—REV. STATS. U. S. 1878, SEC. 2322, CITED.**—By section 2322, *supra*, a locator cannot go outside of any of his lines on the strike or course of any lode, except under rights acquired by him prior to the enactment of 1872, and saved to him under the provisions of that act. (Watervale Min. Co. v. Leach, 34.)
10. **MINES AND MINING—REV. STATS. U. S. 1878, SECS. 2322, 2336, IN HARMONY—SECTION 2336 CONSTRUED.**—Sections 2322 and 2336, *supra*, are in complete harmony. Section 2336 gives no new rights beyond those granted by section 2322, but defines and settles prior existing rights at the space of intersection. (Watervale Min. Co. v. Leach, 34.)

See Jury, 3.

MISDEMEANOR.

Conspiracy to commit. Agreement to commit an overt act must be proved. See Criminal Law, 11.

MISNOMER.

Corporate name. See Pleading, 7.

MONEY HAD AND RECEIVED. See Contract, 4.

MORTGAGES.

1. MORTGAGES—FORECLOSURE—DEFAULT IN PAYMENT OF INTEREST—PRINCIPAL NOT DUE—CONSTRUCTION—HOOPER v. STUMP, 2 ARIZ. 262, 14 PAC. 799, FOLLOWED.—On foreclosure for non-payment of interest of a mortgage providing "in case default be made in payment of the said principal or interest," then the mortgagee is empowered to sell the premises, "and out of the money arising from such sale to retain the said principal and interest," it is proper to enter judgment for the principal, and order a sale of the premises therefor. *Hooper v. Stump, supra*, followed. (Davis v. Dodson, 168.)

See Appeal and Error, 9.

MOTIONS.

Motion to dismiss. See Appeal and Error, 11; Default, 1, 2.

MOTIVE.

Of prosecuting witness—May be shown in prosecution for rape. See Criminal Law, 30.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—PERSONAL INJURIES—ACTION FOR DAMAGES ARISING FROM TORTS OF OFFICERS OR CONDITIONS OF STREETS, SIDEWALKS, ETC.—INHIBITED BY CHARTER OF PHOENIX, ART. 18, SEC. 7.—The charter, *supra*, inhibits an action against the city of Phoenix for damages for personal injuries arising from the granting of permission by the mayor and marshal to discharge fireworks within the city limits. (Fifield v. Common Council, 283.)
2. SAME—SAME—ORDINANCE—SUSPENSION—ACTION AGAINST CITY FOR DAMAGES FOR INJURIES RESULTING FROM DISCHARGE OF FIREWORKS DURING SUSPENSION OF ORDINANCE AGAINST.—The suspension of an ordinance against the discharge of fireworks within certain limits in a city does not render the city liable in an action for damages for personal injuries resulting from the discharge of fireworks within such limits during the time of its suspension. (Fifield v. Common Council, 283.)

MURDER. See Criminal Law, 25, 26, 27.

NEGLIGENCE.

1. NEGLIGENCE—EVIDENCE—DEATH BY WRONGFUL ACT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE UNDER CASE MADE QUESTIONS FOR JURY—REV. STATS. ARIZ. 1887, PAR. 322, CITED.—Where the testimony of plaintiff in an action for wrongful death tended strongly to show that at the time of the accident the train which killed the deceased

NEGLIGENCE (Continued).

was running at a high speed, without warning of its approach, as required by paragraph 322, *supra*, through a village and across a crossing used by deceased and other residents; that upon the north side of the track were obstructions which concealed the train, while upon the south side the view was open; that deceased a few minutes before the train came went over to the north side, and was supposed to have been struck when returning to the south side, which supposition was supported by the fact that the only witness to the train's approach saw no one step on the south side, and injuries of deceased were upon his left side, and that the right flagstaff on the pilot was broken off and found near deceased's body, the case is sufficient to justify the court in leaving the questions of the negligence of defendant, as well as contributory negligence on the part of deceased, to the jury. (Southern Pac. Co. v. Tomlinson, 126.)

2. SAME—CONTRIBUTORY—DUE CARE PRESUMED—BURDEN OF PROOF—LOPEZ v. CENTRAL ARIZONA MINING CO., 1 ARIZ. 464, 2 PAC. 748, FOLLOWED.—The rule in this territory, as declared by the supreme court in the case of *Lopez v. Central Arizona Mining Co.*, *supra*, is, that in actions for personal injuries, where contributory negligence is relied upon as a defense, due care and caution on the part of plaintiff, in absence of proof to the contrary, will be presumed, and the burden of proving such contributory negligence rests upon the defendant. In actions for damages in injuries causing death the same rule prevails. (Southern Pac. Co. v. Tomlinson, 126.)
3. NEGLIGENCE—PLEADING — DEFECTIVE MACHINERY — UNMANAGEABLE HORSES NOT.—Conceding that the complaint is to be construed as a general allegation of negligence in the use of defective machinery, without specifying any particular defect, still the judgment must be reversed, for the reason that the unmanageable team of horses was in no sense "machinery." (Santa Fe etc. Ry. Co. v. Hurley, 258.)

See Master and Servant, 1; Pleading, 4.

NEW TRIAL.

1. NEW TRIAL—MOTION FOR OVERRULED BY OPERATION OF LAW AT EXPIRATION OF TERM WHEN FILED—HAND v. RUFF, 3 ARIZ. 175, 24 PAC. 257, FOLLOWED.—A motion for a new trial is overruled, by operation of law, at the expiration of the term at which it is made. *Hand v. Ruff*, *supra*, followed. (Carroll v. Byers, 158.)

Motion for, must be embodied in bill of exceptions, or points therein cannot be considered on appeal. See Appeal and Error, 17, 19, 23.

See Appeal and Error, 4; Criminal Law, 6, 18, 19, 20.

NOTICE OF APPEAL. See Appeal and Error, 13; Criminal Law, 4, 5.

OFFICE AND OFFICERS.

1. OFFICE AND OFFICERS—BOARD OF SUPERVISORS—MANDAMUS TO COMPEL OTHER MEMBERS TO RECOGNIZE DULY ELECTED SUPERVISOR—PLEADING—SUFFICIENCY OF COMPLAINT—REV. STATS. ARIZ. 1887, PARS. 2335, 2336, CITED.—An affidavit for a writ of *mandamus* setting forth in effect that plaintiff was a duly elected and qualified member of a board of supervisors, and had assumed his duties as such member, and that defendants, other members of the board, and the clerk refused to recognize him as such member, but passed a resolution declaring him not a member, and electing another to his place, and were preventing him from acting as such officer, and would continue to so prevent him from acting, states a cause of action. Rev. Stats., *supra*, cited. (Hawke v. McAllister, 150.) SLOAN, J., concurring specially.
2. OFFICE AND OFFICERS—BOARD OF SUPERVISORS—POWER TO PASS ON ELIGIBILITY OF MEMBERS—DE FACTO MEMBERS—RIGHT TO WRIT OF MANDAMUS TO COMPEL ADMISSION TO OFFICE.—The board of supervisors have no power to pass upon the eligibility of its members. A *de facto* member is entitled to recognition as such by the other members and clerk of the board, and has a right to the writ of *mandamus* to compel such recognition. (Hawke v. McAllister, 150.)
3. OFFICE AND OFFICERS—COUNTY RECORDER—FEES—RECORDING TAX-DEEDS—COUNTY CHARGE—REV. STATS. ARIZ. 1887, PAR. 2703, CITED—PAYMENT HOW PROVIDED—REV. STATS. ARIZ. 1887, PARS. 2709, 2710, CITED.—A county recorder cannot recover fees from the county for services in filing and recording tax-deed and tax-certificates. Par. 2703, *supra*, providing for the recording without charge to the county. The payment of the fees of the recorder is provided for out of money collected for taxes by paragraphs 2709 and 2710, *supra*. (County of Maricopa v. Osborn, 331.)
4. OFFICE AND OFFICERS—COUNTY TAX-COLLECTOR—FEES—EXECUTING TAX CERTIFICATES—ACKNOWLEDGMENTS—COUNTY CHARGE—STATUTORY FEES—REVENUE ACT.—A tax-collector cannot maintain an action against the county for fees for executing tax-certificates to the territory, nor for money paid for acknowledgments to tax-deeds to the territory. He accepts his office with the law as written in the statutes, and can get such fees only by the mode set out in the Revenue Act. (County of Maricopa v. Rosson, 335.)
5. OFFICE AND OFFICERS—SHERIFF—FEES—MILEAGE FOR PRISONER—REV. STATS. ARIZ. 1887, PAR. 1972, CONSTRUED—YAVAPAI CO. v. O'NEILL, 3 ARIZ. 363, 29 PAC. 430, CITED.—There is nothing in the Fee and Salary Act, *supra*, authorizing any charge to be made for mileage for a prisoner while in charge of an officer under a warrant of arrest. *Yavapai Co. v. O'Neill*, *supra*, cited. (Gila County v. Thompson, 180.)
6. SAME—SAME—SAME—MILEAGE FOR EXECUTING CRIMINAL PROCESS—REV. STATS. ARIZ. 1887, PAR. 1972, CONSTRUED—YAVAPAI CO. v.

OFFICE AND OFFICERS (Continued).

O'NEILL, 3 ARIZ. 363, 29 PAC. 430, FOLLOWED.—Under the Fee and Salary Act, *supra*, an officer is allowed "for each mile he may be compelled to travel in executing criminal process, . . . to be charged one way only, thirty cents." To execute a warrant of arrest, an officer must not only arrest, but must remove the prisoner from the place of arrest to the court wherein the writ issued, and the officer is entitled to mileage not merely to the place of arrest but until he has brought his prisoner to the place named in the writ. *Yavapai Co. v. O'Neill*, *supra*, followed. (Gila County v. Thompson, 180.)

BAKER, J., dissenting.

7. SAME—SAME—SAME — DEMAND — ALLOWANCE — ACCEPTANCE PRECLUDES FURTHER CLAIM — REV. STATS. ARIZ. 1887, PAR. 414, CONSTRUED—YAVAPAI CO. v. O'NEILL, 3 ARIZ. 363, 29 PAC. 430, FOLLOWED.—Where the sheriff made out and presented his claim in the first instance for a less amount than he was entitled to receive, which was allowed by the board and accepted by him, he cannot, under the statute *supra*, make a subsequent demand for an additional allowance on the same demand. And if, in the first instance, he had made out a claim for the full amount of mileage which he was entitled to receive, but was allowed by the board only a part of his demand, his acceptance of such part precluded him, under said statute, *supra*, from bringing any action for the balance. *Yavapai Co. v. O'Neill*, *supra*, cited. (Gila County v. Thompson, 180.)

HAWKINS, J., dissenting.

8. OFFICE AND OFFICERS—USURPATION—DAMAGES—REV. STATS. ARIZ. 1887, PAR. 3195, CONSTRUED.—Under a statute providing that if judgment be rendered upon the right of any person to any office in his favor, he may recover the damages he shall have sustained by reason of the usurpation of the office by the defendant, it is error to sustain the special demurrer of the incumbent of any office holding under a void act of the legislature to that part of the complaint for the recovery of the office which alleges damages. (Bravin v. Mayor etc. of Tombstone, 83.)
9. OFFICE AND OFFICERS—VACANCY—APPOINTEE—UNEXPIRED TERM—REV. STATS. ARIZ. 1887, PAR. 3116, CONSTRUED.—Under the statute, *supra*, providing that the person appointed or elected to fill an office made vacant, after qualifying, possesses all the rights, etc., of the officer whose place he takes; he acquires the office for the remaining or unexpired portion of the term. (Sheen v. Hughes, 337.)
10. SAME—BOARD OF SUPERVISORS—FILLING VACANCIES—PERPETUATING TERM.—Provision having been made for the filling of vacancies in the entire board of supervisors, two of whom have terms not to exceed two years, and one having a term not to exceed four years,

OFFICE AND OFFICERS (Continued).

those whose duty it is to fill such vacancies must do so in a way that the terms of the former members of the board will be perpetuated for those terms, each term in the person of a certain individual. (Sheen v. Hughes, 337.)

11. SAME—VACANCY—APPOINTEE—ELECTION OF SUCCESSOR.—Where a vacancy in the office of supervisor has been filled by appointment there can be no election of a successor to such office until the expiration of the original term. (Sheen v. Hughes, 337.)

See Justice of Peace, 4.

OFFICERS.

1. OFFICERS—GOVERNOR—VETO—SIGNATURE EVIDENCE OF APPROVAL—ACT OF CONGRESS OF JULY 19, 1876—ORGANIC ACT CONSTRUED—REV. STATS. ARIZ. 1887, APPENDIX, SEC. 1, SUBD. 17, HELD VALID.—By the terms of the Organic Act, *supra*, the governor, in exercising the veto power, is limited to the following courses of action: First, if he approve a bill, he shall sign it; second, if he shall not approve it, he shall return it, together with his objection, to the house in which it originated; third, he may retain a bill presented to him for his approval until it becomes a law by the expiration of ten days, if the legislature remain in session so long. Whatever the governor may do in the premises has reference to a bill in its entirety. The signature of the governor affixed to a bill is the evidence of his approval, and what he may thereafter do in the way of adding objections to any part of the bill is immaterial; and when it appears that the governor signed the appropriation bill passed in 1887, but in signing it he added that the same was approved, except as to subdivision 17 of section 1, this action must be taken as an approval of the whole bill, including subdivision 17. (Porter v. Hughes, 1.)
2. OFFICERS—SALARY—DE FACTO OFFICER'S RIGHT TO—IN ABSENCE OF DE JURE OFFICER—BEHAN v. DAVIS, 3 ARIZ. 399, 31 PAC. 521, FOLLOWED.—An officer *de facto* is entitled to the salary of the office for the performance of the duties thereof, there being no *de jure* officer. *Behan v. Davis*, *supra*, followed. (Adams v. Directors of Insane Asylum, 327.)

See Corporations, 1.

OPINION. See Evidence, 2, 3.

ORDINANCE.

Suspension of—Damages for—Not recoverable against city. See Municipal Corporations, 2.

PARKS. See Dedication, 1, 2, 3, 4.

PARTIES. See Pleading, 7.

PARTNERSHIP. See Estoppel, 1, 2.

PASSION.

Verdict result of—Must be set aside. See Remittitur, 3.

PAYMENT.

Of witnesses in behalf of indigent defendants. See Courts, 2.

PEACE.

Courts should preserve where breach threatened in regard to matters within their jurisdiction and control. See Courts, 1.

PERFORMANCE.

Of conditions, question of fact for jury. See Contract, 7.

PERSONAL INJURIES.

1. **PERSONAL INJURIES—STREET AND SIDEWALKS—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK—INSTRUCTIONS—KNOWLEDGE OF DANGER—FAILURE TO EMBODY ELEMENT OF KNOWLEDGE IN INSTRUCTION.**—An instruction that “the rule denying the right of recovery for negligence in cases in which the plaintiff by simply looking would have avoided the injury complained of, is one of wide application, and the jury is instructed that if the plaintiff fell into the excavation in question (in a public street), while walking along at night, absorbed in thought, or with mind preoccupied, and not looking where he was going, but might have seen the excavation if he had looked, and have avoided it, then he is guilty of contributory negligence, and cannot recover,” is properly refused, as it requires of the plaintiff, a passenger along a public street, which he has a right to assume is safe, a greater degree of vigilance than the law imposes. Though there was evidence in the case tending to show that plaintiff had knowledge of the existence of the trench, and that therefore he would be negligent if he failed to look for it and avoid it, the above instruction does not embody the element of knowledge and the refusal of the trial court to give it was proper. (Huachuca Water Co. v. Swain, 113.)

See Master and Servant, 3; Municipal Corporations, 1, 2.

PERSONAL PROPERTY. See Fraud, 1; Husband and Wife, 2, 3.

PHYSICIAN.

Defined. See Life Insurance, 1.

PLEA.

Necessity for, in criminal case. See Criminal Law, 28.

PLEA IN BAR. See Res Judicata, 2, 3.

PLEADING.

1. **PLEADING—DAMAGES—GROSS AMOUNT—EVIDENCE—ADMISSIBILITY.—**
In actions sounding wholly in damages, where there is but a single cause of action, it is unnecessary to state in the complaint specifically the different elements of damage. It is enough to claim so much gross damages. Under the general allegation, the plaintiff may prove and recover those damages which necessarily result from the act complained of. (Salt River Canal Company v. Hickey, 240.)
2. **SAME—COMPLAINT—SHOWING SALE OF STOCK BY CORPORATION FOR ASSESSMENT—PRESUMPTIONS.—**Allegations in a complaint against a corporation for damages for failure to deliver shares of stock sold by it to plaintiff, showing that the stock was sold by it for an assessment, does not render the complaint bad on demurrer, as it cannot be presumed that the capital stock was all paid up or that the corporation was not authorized to sell the stock. (Salt River Canal Company v. Hickey, 240.)
3. **PLEADING—ISSUES—NOT TO BE RAISED BY EVIDENCE—RECOVERY MUST BE UPON ISSUES RAISED BY PLEADINGS.—**The broad and comprehensive liberality of our system of code pleading was not designed to enable a party to raise issues for the first time by the evidence, or to recover upon an issue other than the one stated in the pleadings. (Santa Fe etc. Ry. Co. v. Hurley, 258.)
4. **PLEADING—NEGLIGENCE—AMBIGUITY—CONSTRUCTION.—**Allegations in a complaint for personal injuries which recite that the pile-driver at which plaintiff was employed was, as it was then used and managed by the defendant, unsafe, defective, and insecure, and being so unsafe and insecure was so unskillfully and in such unsafe manner operated by defendant that the weight used in said pile-driver escaped from its fastenings and injured plaintiff, will be construed as allegations of negligence in using defective machinery, this being the inherent force of the complaint, to save it from confusion and to render it reasonably clear and intelligible. (Santa Fe etc. Ry. Co. v. Hurley, 258.)
5. **SAME—COMMINGLING OF SEPARATE CAUSES OF ACTION—CONSTRUCTION.—**Where a complaint contains words which, if properly arranged, might state two causes of action, it will be construed as stating only the one principally intended. (Santa Fe etc. Ry. Co. v. Hurley, 258.)
6. **SAME—EVIDENCE—ADMISSIBILITY—CONFORMITY TO ISSUE.—**In an action for personal injuries, where the negligence alleged is the use of defective machinery, evidence that the injury was caused by an unmanageable team of horses used in operating the machinery is inadmissible and is reversible error. (Santa Fe etc. Ry. Co. v. Hurley, 258.)
7. **PLEADING—PARTIES—MISNOMER—CORPORATE NAME.—**In an action against "The Mayor and Common Council of the City of Tombstone," a plea in abatement of the action, of misnomer of the cor-

PLEADING (Continued).

poration defendant, in that the corporate name is "The City of Tombstone, of the Territory of Arizona," and not "The Mayor," etc., as pleaded, is properly sustained. (*Bravin v. Mayor etc. of Tombstone*, 83.)

See Contract, 5, 6; Criminal Law, 21, 22; Negligence, 3; Office and Officers, 1.

POLICY. See Life Insurance, 2, 3, 4.

POSSESSION.

Immaterial in action to quiet title, under statute. (*Bishop v. Perrin*, 190.)

In forcible entry and detainer. See Forcible Entry and Detainer, 1.

See Action to Quiet Title, 1.

POSSESSORY RIGHT. See Taxes and Taxation, 3, 4.

PRE-EMPTIONS. See Mexican Grants, 4; Public Lands, 3.

PREJUDICE. See Criminal Law, 18, 19.

PREMEDITATED DESIGN.

Necessary to conviction for aggravated assault under statute. See Criminal Law, 1.

PRESUMPTIONS. See Constitutional Law, 1; Master and Servant, 2; Pleading, 2.

PRINCIPAL. See Appeal and Error, 9.

PROCESS.

Compulsory for obtaining witnesses. See Constitutional Law, 1.

PROCLAMATION.

Calling elections—Necessity for—Purpose of. See Elections, 1.

PROOF PRESUMED.

Where bill of exceptions does not purport to contain all the evidence. See Appeal and Error, 28.

PROSECUTRIX.

Uncorroborated testimony of, sufficient to convict of rape. See Criminal Law, 32.

PUBLIC LANDS.

1. PUBLIC LANDS—DESERT LAND ACT—CONTRACT TO CONVEY AFTER PATENT ISSUES—VALIDITY.—An agreement may be lawfully entered

PUBLIC LANDS (Continued).

into by one holding a desert land entry to convey the title to the same when patent shall have been obtained. Such contract does not contemplate a violation of any of the provisions of the desert land laws as to the requirements necessary to obtain title, or restricting the quantity of land which may be acquired by any one person under it, nor a violation of any ruling of the land department which has the effect of law. (*Arnold v. Christy*, 19.)

2. **PUBLIC LANDS—EJECTMENT—RIGHT TO MAINTAIN—RECEIVER'S DUPLICATE RECEIPT OF ENTRY—REV. STATS. ARIZ. 1887, PAR. 3138, CONSTRUED.**—A receiver's duplicate receipt of a homestead filing upon land, made after contest and cancellation of the entry of a prior occupant, is not sufficient evidence of title and right to possession in the holder thereof to maintain an action of ejectment against such prior occupant. Statute, *supra*, construed. (*Balsz v. Liebenow*, 227.)
3. **PUBLIC LANDS—SCHOOL LANDS—PRE-EMPTION—ASSIGNMENT—REV. STATS. U. S. 1878, SECS. 1946, 2275, CONSTRUED—SECTION 2263 CITED.**—Section 1946, *supra*, provides that sections sixteen and thirty-six in each township of certain territories, including Arizona, shall be reserved for school purposes. Section 2275, *supra*, provides that where settlements with a view to pre-emption have been made before survey, which are found to be on school sections, those sections shall be subject to the pre-emption claim of such settlers, and if they have been or shall be reserved for school purposes, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors. Under these sections the right of pre-emption of school lands is personal to settlers found upon school lands at the time of the survey of the lands in the field. In this case the settlers failed to assert any claim themselves to pre-emption, but sold their possessions and improvements after survey to appellant. The right being personal, appellant did not succeed thereto, nor was the land ever divested of its character of school land. In addition, section 2263, *supra*, forbids any assignment of the pre-emption right, and appellant could not lawfully succeed to any rights of the prior settlers to the land. (*Gonzales v. French*, 77.)
4. **PUBLIC LANDS—TIMBER—MESQUITE—REV. STATS. U. S., SEC. 2461, CONSTRUED.**—Mesquite, a shrub or small tree, indigenous to the deserts, good only for firewood, and used in the manufacture of no useful article, is not "timber," within the meaning of the statute, *supra*. (*Bustemente v. United States*, 344.)

See Taxes and Taxation, 5.

RAPE. See Criminal Law, 29, 30, 32, 33.

RATIFICATION. See Corporations, 1, 2, 3.

REAL PROPERTY.

Separate estate. See Husband and Wife, 2.

REASONABLE DOUBT. See Criminal Law, 27.

RECORD.

Contradiction in. See Appeal and Error, 4.

Error apparent on face of record, reviewed although not embodied in bill of exceptions. See Appeal and Error, 20.

Judgment overruling demurrer, part of. See Appeal and Error, 20.

Recital in judgment, part of. See Appeal and Error, 25.

See Appeal and Error, 23, 28, 30; Criminal Law, 7, 10, 17.

RECOUPMENT. See Contract, 5; Counterclaim, 1.

REMEDIES. See Water and Water Rights, 5.

REMITTITUR.

1. **REMITTITUR—AUTHORITY TO REMIT—PLAINTIFF IN ACTION FOR INJURIES RESULTING IN DEATH—REV. STATS. 1887, PAR. 2150, CITED AND CONSTRUED.**—Under paragraph 2150, *supra*, providing that an action for injuries resulting in death “may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all,” a widow has authority to bring suit for herself, children, and parents of the deceased. The authority to bring includes also full authority to prosecute, control, and direct the suit to its final determination. If to prevent a new trial being granted, she may remit such portion of the damages awarded by the jury as may be necessary to that end. (Southern Pac. Co. v. Tomlinson, 126.)
2. **SAME—MOTION TO SET ASIDE VERDICT—ALLOWING REMITTITUR AS CONDITION TO OVERRULING MOTION—DISCRETIONARY.**—A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of the power rests in the sound discretion of the court. (Southern Pac. Co. v. Tomlinson, 126.)
3. **SAME—VERDICT—PASSION—MUST BE SET ASIDE—MUST CONSIDER WHOLE CASE.**—Where the verdict is the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question the court should look not alone to the amount of the damages awarded, but to the whole case. (Southern Pac. Co. v. Tomlinson, 126.)

See Verdict, 1.

REPEAL.

When conflict operates as. See Statutory Construction, 1.

REPUTATION.

General—Limited to trait involved in the charge. See Criminal Law, 15.

RESCISSION. See Contract, 2, 4.

RES JUDICATA.

1. **RES JUDICATA—LIMITED TO MATTERS PROPERLY LITIGATED IN SUIT.**—No judgment can be *res judicata* as to matters which the defendant had no legal right to have litigated or directly passed upon in that suit. (Bishop v. Perrin, 190.)
2. **SAME—PLEA IN BAR—JUDGMENT IN FORCIBLE ENTRY AND DETAINER NOT GOOD IN BAR OF ACTION TO QUIET TITLE.**—A judgment in an action of forcible entry and detainer is no bar to an action to quiet title to the same property. (Bishop v. Perrin, 190.)
3. **SAME—SAME—JUDGMENT IN SUIT TO DECLARE SUCH JUDGMENT IN FORCIBLE ENTRY AND DETAINER VOID NO BAR TO ACTION TO QUIET TITLE.**—A judgment in a suit to declare a judgment of forcible entry and detainer respecting certain property void, and to restrain the issuing of a writ of restitution thereunder is not a good plea in bar to an action to quiet title to the same property, as in the injunction proceedings the title was in no way involved, except incidentally. (Bishop v. Perrin, 190.)

RIPARIAN RIGHTS.

Repudiated by statute. See Water and Water Rights, 2.

ROBBERY.

1. **ROBBERY—DEFINED—REV. STATS. 1887; PENAL CODE, PAR. 319; LAWS 1889, ACT NO. 2, APPROVED FEBRUARY 28, 1889, CITED, AND LATTER HELD NOT TO REPEAL FORMER.**—The act of 1889 did not repeal paragraph 319 of the Penal Code. It merely defines a new and additional offense. (In re Smith, 95.)

SALARIES. See Corporations, 1; Officers, 2.

SALE.

Smallest portion for taxes. See Taxes and Taxation, 6, 7.

SCHOOL LANDS.

1. **SCHOOL LANDS—ACTION FOR POSSESSION—EVIDENCE.**—In an action to recover the possession of school lands, it is necessary for the plaintiff to show an actual possession and ouster. (Board of Regents v. Charlebois, 252.)

See Public Lands, 3.

SECRETARY OF TERRITORY. See Statutes, 2.

SECTION-MAN. See Fellow-Servants, 1.

SEPARATE ESTATE. See Husband and Wife, 1, 2, 3.

SERVICE ON AGENT.

Collusion. See Judgment, 1.

SESSIONS OF LEGISLATURES.

Limited to sixty days. See Legislatures, 1.

SHERIFFS.

Duty to sell in form as seized. See Executions, 1.

See Office and Officers, 5, 6, 7.

SPECIAL LEGISLATION.

1. **SPECIAL LEGISLATION—ACT OF MARCH 16, 1891, VOID—IN CONFLICT WITH "HARRISON ACT"** (REV. STATS. ARIZ. 1901, PAR. 63).—The Territorial Act of March 16, 1891, providing "that in all cities in which the total vote cast at the general election held therein on the fourth day of November, 1890, was less than six hundred," the functions of the city assessor, city tax-collector, city license-tax-collector, and street commissioner shall be incident, *ex officio*, to the office of chief of police, is special legislation and a violation of the Harrison Act, it appearing that Tombstone is the only city of that class, and that no provision is made whereby other cities may, in the future, come within its terms and operation. (*Bravin v. Mayor etc. of Tombstone*, 83.)
2. **SAME—CITIES—CLASSIFICATION.**—To avoid objections as to legislation being special or local in character, the classification of municipalities and the incidental imposition of different powers to them according to such classification, must be such that other municipalities may, upon the attainment of the conditions characterizing any particular class, enter that class, and the conditions themselves must be not only possible, but reasonably probable of attainment. (*Bravin v. Mayor etc. of Tombstone*, 83.)
3. **SAME—GENERAL LAWS—LEGISLATURE JUDGE WHEN APPLICABLE IN CASES NOT ENUMERATED—HARRISON ACT.**—The Harrison Act enumerates certain subjects upon which there shall not be local or special legislation. It further provides that, "in all other cases where a general law can be made applicable, no special law shall be enacted." The rule that the legislature is to be the judge of the applicability of a general law, not the courts, applies only to these

SPECIAL LEGISLATION (Continued).

"other cases," not to those specifically enumerated. (Bravin v. Mayor etc. of Tombstone, 83.)

See Statutes, 4

STATEMENT OF FACTS.

Must be approved and signed by judge, before it will be considered part of record. See Appeal and Error, 30.

STATUTES.

1. STATUTES—EVIDENCE OF—JOURNAL NOT ADMISSIBLE TO ALTER—REV. STATS. ARIZ. 1887, PARS. 1867, 1868, 1869, 1870; REV. STATS. U. S., SEC. 1844; 1 SUPP. REV. STATS. U. S., P. 230, CHAP. 212, CITED AND CONSTRUED.—A copy of an act of the territorial legislature certified under the hand and seal of the secretary of the territory is evidence of the act therein contained, and the provisions of such act cannot be added to or taken from by evidence that the journals of the respective houses of the legislative assembly show that said act is not correct. Statutes, *supra*, cited and construed. (Harwood v. Wentworth, 378.)
2. SAME—SAME—DUTY OF SECRETARY OF TERRITORY—AUTHENTICATION—REV. STATS. U. S., SEC. 1844, CITED.—If a document purporting to be an act of the legislative assembly be presented to the secretary of the territory, having upon it the signature of the governor, and purporting to have been approved and signed by him as a law, the secretary may treat it as a law, and cannot resort to any other means to determine whether it is a law or not. Statute, *supra*, cited. (Harwood v. Wentworth, 378.)
3. SAME—SAME—JOURNALS—REV. STATS. ARIZ. 1887, CHAP. 4, TIT. 60, PAR. 2895, SEC. 18, CONSTRUED.—The provisions of the statute, *supra*, do not make the journals of the legislative assembly evidence as to the provisions of an act of the territorial legislature. (Harwood v. Wentworth, 378.)
4. SAME—CONSTITUTIONAL LAW—CHANGING FEES DURING TERM—ACT NO. 51, LAWS 1895, ACT MARCH 21ST—SPECIAL LEGISLATION—NOT IN CONFLICT WITH HARRISON ACT—1 SUPP. REV. STATS. U. S., P. 503 (ORGANIC LAW OF ARIZONA, REV. STATS. 1901, PAR. 63).—The statute, *supra*, changing the mode of classification of counties from the number of registered voters to the assessed valuation of the property within the counties, although changing the fees of public officers during the term for which such officers are elected, is not void as in conflict with the Harrison Act, it not being special legislation. (Harwood v. Wentworth, 378.)
5. STATUTES—PASSAGE—REQUISITES—ACT OF APRIL 2, 1889.—The act *supra*, never became a law, for the reason it was not signed by the governor; nor was it returned to the legislative assembly with his

STATUTES (Continued).

objections and passed over his veto; nor did it remain in his hands ten days during the existence of the legislature. (County of Maricopa v. Osborn, 331.)

STATUTORY CONSTRUCTION.

1. **STATUTORY CONSTRUCTION—CONFLICTS—WHEN OPERATE TO REPEAL.**—The canon of statutory construction that as between conflicting sections of the same statute the last in the order of arrangement shall prevail is applicable only where no reasonable construction will harmonize the parts. (Watervale Min. Co. v. Leach, 34.)
2. **STATUTORY CONSTRUCTION — INTENT CONTROLS — WHOLE STATUTE MUST BE CONSIDERED.**—In the construction of a statute it is the intent and purpose of the law, not the letter, that must control; and the whole statute must be considered. (Liebes v. Steffy, 11.)

See Criminal Law, 13.

STATUTORY DEFINITION OF OFFENSE.

Reading, does not cure erroneous instruction as to elements of the crime. See Criminal Law, 2.

STIPULATION. See Appeal and Error, 30.

STOCK AND STOCKHOLDERS.

1. **STOCK AND STOCKHOLDERS—SALE OF STOCK BY CORPORATION—FAILURE TO TRANSFER OF CORPORATE BOOKS—DAMAGES—MEASURE OF.**—The buyer of capital stock from a corporation, having paid the contract price for the stock, in an action for damages for failure to deliver or transfer the stock on its corporate books, is entitled to recover the value of the stock at the time of the refusal of defendant to deliver the same, or its value at the time of its conversion, with legal interest from that time. (Salt River Canal Company v. Hickey, 240.)

STREET AND SIDEWALKS. See Personal Injuries, 1.

STRIKE. See Mines and Mining, 3.

SUBROGATION. See Claim and Delivery, 2.

SUPPLEMENTAL ANSWER. See Claim and Delivery, 2.

SUPREME COURT.

Jurisdiction on appeal. See Appeal and Error, 2.

SURETIES.

Justification of. See Appeal and Error, 14.

Liabilities of. See Bonds, 2.

SURETY ON APPEAL BOND.

Not liable to appellee where appeal was dismissed on appellee's motion because of insufficiency of bond. See Bonds, 1.

TAXES AND TAXATION.

1. **TAXES AND TAXATION—ASSESSMENT — DELINQUENT LIST — IRREGULARITIES—REV. STATS. ARIZ. 1887, PAR. 2688, CITED—ATLANTIC AND PACIFIC R. R. Co. v. YAVAPAI Co., 3 ARIZ. 117, 21 PAC. 768, FOLLOWED.**—Objections to the manner of assessing taxes, preparing and returning the delinquent list, and similar questions are mere irregularities, and are covered by statute, *supra*. *Atlantic and Pacific R. R. Co. v. Yavapai Co., supra*, followed. (Delinquent Tax-List v. Territory, 186.)
2. **SAME—LEVY—UNCONFIRMED MEXICAN LAND GRANTS — VALIDITY—WHO MAY QUESTION—TENDER OF TAXES DUE.**—The objectors will not be heard to complain of the taxation of property consisting of "unconfirmed Mexican land grants," having neither paid nor tendered the taxes admittedly due for the same year on other property owned by them. (Delinquent Tax-List v. Territory, 186.)
3. **SAME—UNCONFIRMED MEXICAN LAND GRANTS—LEVY—POSSESSORY RIGHT—REV. STATS. ARIZ. 1887, PAR. 2631, CITED.**—The possessory right or claim of one in an unconfirmed Mexican land grant may be taxed, though the land belong to the public domain. Statute, *supra*, cited. (Delinquent Tax-List v. Territory, 186.)
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6. **TAXES AND TAXATION — SALE — COLLECTOR'S DUTY TO DESIGNATE SMALLEST PORTION—REV. STATS. ARIZ. 1887, PAR. 2694, MANDATORY.**—The statute, *supra*, providing that the owner of property offered for sale for taxes may designate in writing what portion of the property he wishes sold, if less than the whole, but if he does not, then the collector *may* designate it, and the person who will take the least quantity and pay the taxes shall be declared the purchaser,

TAXES AND TAXATION (Continued).

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BAKER, C. J., dissenting.

7. SAME—SAME—REV. STATS. ARIZ. 1887, PAR. 2694—DESIGNATION BY COLLECTOR—SUFFICIENCY—VALIDITY.—On a sale of property for taxes under statute, *supra*, an inquiry by the collector, "Who will take the lowest portion or quantity of block 184 and improvements and pay the taxes and costs due?" is not such a designation as is required by the statute, and a tax-deed based on such sale is void. (Jacobs v. Buckalew, 351.)

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See Dedication, 4; License, 1, 2, 3.

TENDER.

Taxes admittedly due—Must be made before complaint as to other will be heard. See Taxes and Taxation, 2.

TIE VOTE.

Incumbent holds over and there is no vacancy. See Justice of Peace, 4.

TIMBER.

Mesquite not. See Public Lands, 4.

TITLE. See Mexican Grants, 2.**TORTS.**

1. TORTS—DEATH FROM WRONGFUL ACT—ACTION FOR DAMAGES—STATUTORY—REV. STATS. ARIZ. 1887, PAR. 2145.—A suit brought by the administrator of the estate of decedent, for the benefit of the widow and children, for damages resulting from his death, caused by the alleged wrongful act of appellant, is a statutory action, and the right to recover must be found within the provisions of the statute, *supra*. (Don Yan v. Ah You, 109.)
2. SAME—SAME—SAME—INSTRUCTIONS—LIABILITY FOR ACTS OF AGENT—REV. STATS. ARIZ. 1887, PAR. 2145, CONSTRUED.—In an action for damages on account of injuries causing death, under statute, *supra*, providing that such actions may be brought "(1) When the

TORTS (Continued).

death of any person is caused by the negligence of the proprietor . . . of any railroad . . . or other vehicle for the conveyance of goods or passengers; or by the unfitness, gross negligence, or carelessness of their servants or agents; (2) When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another," instructions in effect that defendant was liable whether the negligence or default was his own or that of a partner or co-owner is error, it clearly appearing that he was not one of the persons mentioned in clause 1, *supra*, and it being the intention of the legislature to classify persons liable into those liable for their own acts, as well as those of their servants and agents, and those liable for their own neglect or wrongful act only. (Don Yan v. Ah You, 109.)

TRANSFERS. See Fraud, 1; Stock and Stockholders, 1.

TRANSCRIPT. See Appeal and Error, 4; Justice of Peace, 1.

TRIAL.

By jury, defined. See Jury, 4.

Reading indictment and plea to jury not jurisdictional. Pleading and reading plea distinguished. See Criminal Law, 34, 35.

TRUSTS.

1. **TRUSTS—EVIDENCE—MAY BE ESTABLISHED IN REAL ESTATE BY PAROL—MUST BE CONVINCING.**—A trust in real estate may be established by parol evidence, but such evidence must be clear and convincing, not doubtful, uncertain, and contradictory. (Butler v. Shumaker, 16.)
2. **SAME—BURDEN OF PROOF—APPEAL AND ERROR—CONFLICT IN EVIDENCE.**—The burden of proof is upon the one seeking to establish a trust in real estate, and where the evidence is conflicting, under well-established rules, the judgment of the trial court, that there was no trust, will not be disturbed. (Butler v. Shumaker, 16.)

UNEXPIRED TERM.

Board of Supervisors, appointee holds for. See Office and Officers, 9, 10, 11.

UNLAWFUL BRANDING. See Criminal Law, 36.

USURPATION. See Office and Officers, 8.

VACANCY.

In Board of Supervisors—How filled. See County Officers, 3.
See Justice of Peace, 5; Office and Officers, 9, 10, 11.

VALENTINE SCRIP. See Taxes and Taxation, 5.

VALIDITY OF INCORPORATION LAW.

Cannot be attacked by one to defeat recovery for goods purchased by him from company incorporated under said law.

See Corporations, 4.

VENUE. See Justice of Peace, 1.

VERDICT.

1. VERDICT—DAMAGES—EXCESSIVE—REMITTITUR—CONDITION TO DENYING NEW TRIAL.—Verdict held excessive, and district court ordered to modify judgment, provided plaintiff shall elect to remit ten thousand dollars from his former judgment; otherwise, a new trial ordered. (McGill v. Southern Pac. Co., 116.)

See Appeal, 1; Constitutional Law, 2; Remittitur, 1, 2, 3.

VETO. See Officers, 1.

WAIVER.

Of error. See Appeal and Error, 4, 5.

Of performance of conditions. See Contract, 7.

WARRANTIES. See Life Insurance, 2, 3, 4.

WATER AND WATER RIGHTS.

1. WATER AND WATER-RIGHTS—COMMON LAW—INAPPLICABILITY.—The common law has no application whatever to the use of water and can furnish no aid in the adjustment of water-rights in this territory. (Chandler v. Austin, 346.)
2. SAME—SAME—RIPARIAN RIGHTS—REPUDIATED BY REV. STATS. ARIZ. 1887, PAR. 3198.—The common-law doctrine of a riparian right is expressly repudiated by statute, *supra*. (Chandler v. Austin, 346.)
3. SAME—DIVERSION—RIGHT TO HAVE WATER DELIVERED IN RIVER AT HEAD OF DITCH.—Appellees, prior appropriators of water for irrigation and milling purposes, are not entitled to an injunction restraining appellants, subsequent appropriators for power purposes, from diverting water appropriated by appellees further up the stream, except for mechanical purposes, and compelling appellants, after such use, to return it to the natural channel above the appellees' point of diversion, where it appears that appellants are returning such water to appellees' ditch above the point of any use by appellees. (Chandler v. Austin, 346.)
4. SAME—APPROPRIATION—DELIVERY AT CERTAIN POINT—DAMAGE.—A person entitled to the use of a certain quantity of water is not entitled to receive such water at one place instead of another,

WATER AND WATER RIGHTS (Continued).

provided his rights are in no way affected. (Chandler v. Austin, 346.)

5. **SAME—SAME—INTERFERENCE—REMEDIES—DAMAGES — INJUNCTION.**
—Improper use of water by appellants, or failure to deliver back the proper amount, affords an action at law for damages, and not ground for an injunction. (Chandler v. Austin, 346.)

WITNESSES.

1. **WITNESSES—CREDIBILITY—FALSE TESTIMONY AS TO MATERIAL FACT.**
—An instruction that if the jury find that any witness has sworn falsely on any material fact, they have the right to disregard his whole testimony, unless corroborated, is erroneous. This rule only applies in case the witness has knowingly and willfully sworn falsely. (Territory v. Follett, 91.)
See Constitutional Law, 1.

WRIT OF PROHIBITION.

1. **WRIT OF PROHIBITION—APPEAL—TO TEST JURISDICTION—ADEQUACY OF REMEDY BY APPEAL OR ERROR.**—A writ of prohibition will not issue against the district court to prevent the hearing of an appeal from probate court for the reason of want of jurisdiction in said court to hear said appeal because of the failure to file a sufficient appeal-bond, the remedy by appeal or error being adequate in this case. (Walker v. District Court, 249.)
2. **SAME—ADEQUACY OF REMEDY BY APPEAL—DETERMINED UPON APPLICATION.**—If there are cases in which the remedy by appeal or error might not be considered adequate, that question, with the question of jurisdiction, should be left to be decided upon the application. (Walker v. District Court, 249.)
3. **SAME—GROUNDS FOR—EXPENSE AND DELAY OF TRIAL AND APPEAL.**—To be put to trial and then to appeal, with its attendant expense and delay, is no reason for granting a writ of prohibition. (Walker v. District Court, 249.)

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SURETY ON APPEAL BOND.

Not liable to appellee where appeal was dismissed on appellee's motion because of insufficiency of bond. See Bonds, 1.

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TAXES AND TAXATION (Continued).

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